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NOMINATION OF DANIEL A. MANION

REPORT

FROM THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

TOGETHER WITH

ADDITIONAL AND MINORITY VIEWS

(TO ACCOMPANY THE NOMINATION OF DANIEL A. MANION TO BE UNITED STATES CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT)

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The Committee on the Judiciary, to which was referred the nomination of Daniel A. Manion to be a U.S. Judge for the Seventh Circuit Court of Appeals, reported the nomination to the full Senate on May 9, 1986, without recommendation.

BACKGROUND

The Committee received the President's nomination of Daniel A. Manion for the position of U.S. Judge for the Seventh Circuit Court of Appeals on February 21, 1986. In accordance with a committee agreement concerning judicial nominations, a hearing regarding this nomination was delayed for 3 weeks. The hearing relative to Mr. Manion's nomination was held on March 12, 1986.

Senators Lugar (R-Ind.) and Quayle (R-Ind.) introduced the nominee and urged the Committee to approve his nomination. Senator Quayle, who has personally known Mr. Manion for over 15 years, praised Manion stating that he "possesses a record that illustrates his respect for the traditions of the American legal system and for the principle of constitutional sovereignty. I am confident Dan will serve the Seventh Circuit Court of Appeals with forthrightness, fairness, integrity and dedication. I know from longtime experience that Dan has the personal respect for the law and the personal compassion that are prerequisites for a jurist sitting on the U.S. Court of Appeals."

Mr. Manion appeared at the hearing and answered all questions asked of him. Approximately 2 weeks after the hearing, Senator Biden (D-Del.) on behalf of the minority members of the Committee requested additional information and materials relative to Mr. Manion. The information and materials were provided. Mr. Manion's nomination was listed on the agenda for the Committee's executive session for March 27, 1986. However, a quorum was not obtained on March 27, 1986. A quorum of the Committee did meet on April 10, 1986, and consideration of Mr. Manion's nomination was deferred for 1 week at the request of the Minority. On April 17, 1986, the minority requested another hearing on the nomination and agreed to vote on the nomination on May 8, 1986. Their request was granted.

A second hearing was conducted on April 30, 1986, and, once again, Mr. Manion responded to all questions asked of him.

On May 8, 1986, consideration by Committee members of a motion to forward Mr. Manion's nomination to the full Senate with a recommendation of approval resulted in a tie vote. Subsequently, a motion to forward Mr. Manion's nomination to the full Senate without recommendation was approved by a vote of 11 to 6.

DANIEL A. MANION'S QUALIFICATIONS

Mr. Manion graduated from the University of Notre Dame in 1964 with an A.B. degree in Political Science. He received the John J. Cavanaugh Award at Notre Dame in 1964 which is given annually to the senior Army cadet ROTC officer showing excellence in leadership, academic attainment and participation in military affairs. He served two years in the U.S. Army in 1965 and 1966, including a tour in Vietnam. It is appropriate to note that Mr. Manion is the first Vietnam veteran to be nominated to the Court of Appeals.

While attending law school Mr. Manion worked full time as the Director of Industrial Development Division of the Indiana Department of Commerce. After graduation from Indiana University School of Law in 1973, he worked as a law clerk and a Deputy Attorney General for the State of Indiana. As a member of the criminal appellate section, he authored approximately twenty briefs on a wide variety of issues involving criminal appeals. He was assigned to argue cases before the Indiana Supreme Court, despite the fact that oral argument in criminal appeals is rare in Indiana. In the highway condemnation section, Mr. Manion worked on property condemnation cases for the State. He tried approximately six such cases and settled a number of others.

In 1974 Mr. Manion returned to South Bend to practice law. Joining a small law firm, his practice quickly thrived and today Mr. Manion is a named partner in the firm.

Mr. Manion's current practice is about 75 percent litigation, encompassing a wide range of legal areas including: banking, insurance, civil rights, and tax, as well as commercial defense and personal injury cases on both the plaintiff and the defendant side. He has personally tried about 35 cases before a jury; has participated to date in varying degrees in approximately twenty cases in federal court, several as lead counsel; and has served as co-counsel on several large complex cases including matters involving Federal securities laws.

In 1978, Mr. Manion was elected to the Indiana State Senate by defeating the majority caucus leader. After only 2 years in the State senate, he was designated as chairman of the Committee on Energy and Environmental Affairs, a notable elevation for a junior senator. He also served on the Judiciary Committee for 4 years and for 2 years was Chairman of the Civil Law Subcommittee. Additionally, he was the ranking member of the Education, Labor, Commerce, and Insurance and Financial Institutions Committee in 1982.

In connection with Mr. Manion's qualifications, an organization called the Chicago Council of Lawyers, which represents some 1,000 lawyers, has stated:

> Mr. Manion has a high reputation for integrity, conscientiousness, and fairness. The reports from South Bend (Indiana) lawyers also indicate that Mr. Manion has excellent interpersonal skills, and that lawyers who worked both with and against him like and respect him. Many of the lawyers to whom we talked also thought that, despite his reputation for political conservatism, Mr. Manion

would struggle to be fair in ruling on cases which present issues on which he has strong political views.

In addition, the Council said:

> The majority of lawyers to whom we talked regarding Mr. Manion's legal experience thought that he was a competent lawyer. A few lawyers told us that Mr. Manion was an outstanding lawyer. All vouched for his forthrightness and his adherence to high, ethical standards.

Despite this positive information regarding Mr. Manion's integrity and competence, citing no other factual basis, this small group of Chicago lawyers expressed concern regarding Manion's ability to deal adequately with the difficult legal issues which are routinely presented to the Seventh Circuit.

Mr. Manion's legal background is diversified, including civil and criminal law, State and Federal practice, and trial and appellate experience. He possesses an excellent background of broad litigation experience as well as experience in the executive branch of the State government and experience as a State legislator who has served on committees dealing with a broad spectrum of issues which continually come before the Court of Appeals.

ABA RATING

A substantial majority of the Standing Committee on Federal Judiciary of the American Bar Association found Mr. Manion to be qualified for this position. The ABA in its publication *The Standing Committee on the Federal Judiciary—What It Is And How It Works* has stated that the Committee's evaluation of prospective nominees is directed primarily to professional qualifications and specifically includes consideration of competence, integrity, and judicial temperament:

> Professional competence encompasses such qualities as intellectual capacity, judgment, writing and analytical ability, industry, knowledge of the law and professional experience.
>
> The Committee believes that political activity and public service are valuable experiences, but that such activity and service are not a substitute for significant experience in the practice of law.
>
> In investigating temperament, the Committee looks to the prospective nominee's compassion, decisiveness, openmindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice, among other factors. The prospective nominee's character, integrity and general reputation in the legal community are investigated, as are his or her industry and diligence. Community and professional contributions are considered relevant.

Based on these stringent standards, scrutiny of Mr. Manion's qualifications resulted in a substantial majority of the Committee finding him to be qualified to serve on the Court of Appeals for the Seventh Circuit. A substantial majority indicates that from 10 to 13 members of the 14 member Committee found a nominee to be

qualified. Therefore, only a negative vote by one member of the Committee would constitute a minority.

It should be noted that "qualified" is the norm. Furthermore 43 percent of all nominees to the Court of Appeals under President Reagan have received this rating and each has been approved by the Senate. It has been suggested that Mr. Manion does not meet the same high standards as other conservative Reagan nominees such as Judges Posner and Easterbrook of the Seventh Circuit; Judge Bork of the D.C. Circuit; Judges Winter and Mahoney of the Second Circuit; Judge Noonan of the Ninth Circuit; and Judge Edmondson of the Eleventh Circuit. As nominees, more than half of these judges received the same rating as did Mr. Manion. In fact only one of these judges received above a qualified rating.

FEDERAL EXPERIENCE

Mr. Manion has participated in numerous Federal court cases. Currently he is lead counsel on three pending Federal cases, two involving securities and the Racketeer Influenced and Corrupt Organizations Act, and one diversity case. Additionally, he is co-counsel on two patent infringement cases and another diversity case. A number of cases in which Mr. Manion was involved in State court could have been brought in Federal court under diversity jurisdiction; but, for tactical reasons, the actions were brought in State court. Practice in State courts should not be brushed aside as detracting from an individual's ability to perform ably on the Federal bench.

The suggestion that he is not qualified because he has not tried a constitutional law case is also specious. Lawyers generally and many lawyers presently serving on the Federal bench, whether from relatively small-town law firms or large urban firms, have not tried constitutional law cases. It degrades the qualifications of many thousands of lawyers to suggest that only attorneys whose experience has been constitutional litigation in Federal courts are fit to hold Federal judgeships. If this were the exclusive criteria to be applied, it would exclude most small-town, small-firm practitioners. In addition, demeaning court cases because of small monetary stakes is also misleading. Anyone who has practiced law knows that the dollar amount involved in litigation has no bearing on the degree of difficulty or the importance of the issues involved.

Strong endorsements of Mr. Manion have been forwarded to the Committee by individuals we believe are in a position to make informed judgments concerning his attributes and legal talents. Father Theodore M. Hesburgh, C.S.C., President of the University of Notre Dame, former Chairman of the U.S. Commission on Civil Rights, stated in recommending Mr. Manion that "His life has been one of service and commitment to justice." The Honorable Richard M. Given, Chief Justice of Indiana, and Eugene I. Goldman of the law firm of Steptoe and Johnson are a few of the many who have endorsed Mr. Manion.

Of particular significance is a letter received from David T. Ready, the former U.S. Attorney for the Northern District of Indiana, appointed by President Carter. The letter reads in part as follows:

> I have known Mr. Manion for a number of years. I believe that he is eminently qualified to fulfill the position of the United States Circuit Court Judge. I firmly believe he possesses the necessary intellect, integrity, and open-mindedness which practicing members of the Bar have a right to expect in our judicial appointments.
>
> I would hasten to add that Mr. Manion enjoys an excellent reputation amongst his peers.
>
> During the years 1977 through 1981 I had the opportunity to serve as United States Attorney for the Northern District of Indiana, having been appointed to that position by President Carter. This gave me the opportunity to observe our Federal Judiciary at both trial and appellate levels. As such, I would hope that it also gave me some insight into what Judicial qualities best serve our legal system, especially at the Federal Appellate level. I firmly believe Mr. Manion possesses those qualities, temperament, legal intellect, experience, fair-mindedness, judicial integrity, and a plain, old-fashioned willingness to work long and hard. I have no doubt that Mr. Manion's appointment will reflect credit upon the Federal Judiciary.

In commenting on an inquiry he received about Mr. Manion from *People for the American Way,* Mr. Ready states the following:

> I must say that I was disappointed in the nature of their inquiry and the questions they asked of me. I have no bone to pick with that organization and, in fact, am sure that they serve a very valid and useful purpose in attempting to counter-balance some of our more conservative minded organizations. That is all in the give and take of the American political system. However, I must say that the overall tone of their inquiry was not one in which they were seeking my opinion on Mr. Manion's qualifications, but rather looking for something negative concerning Mr. Manion. When it became apparent that I was not going to accommodate them, simply because I do not know anything negative about Mr. Manion, their interest in talking to me waned sharply and the conversation terminated abruptly.

Mr. Ready concludes:

> Finally, Senator Thurmond, I would note that the most recent appointments to our Seventh Circuit Court of Appeals have emanated from the area of academia. I have no problems with the qualifications of many of those persons who were so appointed. However, I believe that our Courts of Appeals are best served when they are comprised of former trial judges, academics, and practicing lawyers. It is my opinion that Mr. Manion is an excellent representative of that latter group and will well serve on the Court of Appeals.

This letter, together with the foregoing recital of his past and current Federal practice illustrates that Mr. Manion has ample experience in the Federal courts. We think the quoted letter also illustrates the approach taken by his opponents.

MR. MANION MAINTAINS THAT THE CONSTITUTION IS THE SUPREME LAW OF OUR LAND

Some have evidenced a concern that Mr. Manion persists in designating the Constitution as the supreme law of our land, while labeling Supreme Court opinions only as *stare decisis* which must be followed by lower Federal courts. That position is, of course, in keeping with article VI of the Constitution, as well as with the holdings of the Supreme Court itself (which has since *Marbury* v. *Madison* recognized that it derives its power of judicial review from the Constitution to which it is subservient). As Justice Marshall noted in *Marbury,* the "courts, as well as other departments, are bound by [the Constitution]." A Supreme Court holding is binding on lower courts; an opinion construing the Constitution is not in fact the Constitution itself and no court to our knowledge has ever made such a claim. The high court may itself, of course, alter its interpretation of what the Constitution mandates, but remains bound by the document.

Mr. Manion affirmed repeatedly in his sworn confirmation testimony that he wholeheartedly believes in the principle of *stare decisis* that lower Federal courts are obliged to follow the holdings of the Supreme Court, as he stated: "If a judge is going to rule on a case and there is a Supreme Court precedent on that same set of facts and on that same issue, I am bound to follow that. *Stare decisis* is the order of our legal practice, and anyone who tries to avoid that by initiating his or her own feelings or philosophy as a judge is violating that process. And I respect it too much to do that." (Hearings, April 30, at 7/8).

Mr. Manion's commitment to follow Supreme Court precedent on the appellate bench is in no way undermined by his vote as a State legislator (along with an overwhelming 39–9 majority of the Indiana State Senate) to *authorize* voluntary posting of the Ten Commandments in Indiana public schools. That vote followed shortly after the bare 5–4 *per curiam* holding in *Stone* v. *Graham*, 449 U.S. 39 (1980), that a Kentucky statute *requiring* that the Commandments be posted lacked the requisite secular legislative purpose. Not only was the proposed Indiana legislation significantly different from the statute invalidated by the close result in *Stone*, but Mr. Manion's obligations as a State Senator voting on a bill he believed to be constitutional were quite different from what would have been required of him as a lower court federal judge.

The *per curiam* opinion of the bare court majority in *Stone* does not provide any detailed analysis spelling out for State legislators the precise limits of State authority in this area. Moreover, any alteration in the Kentucky statute that would have influenced the vote of only one Justice would have produced a different outcome: the *Stone* opinion drew the dissents of the Chief Justice as well as of Justices Blackmun, Stewart, and Rehnquist. The bill that swept through the Indiana Senate differed from the Kentucky statute in numerous respects. Among other differences:

The Indiana bill did *not* require posting of the Commandments.

The Indiana legislation explicitly stated that its purpose was "not to display the Ten Commandments as a religious symbol,

> but to publicly acknowledge the importance of this universal document in shaping the development of the institutions and traditions of western civilization."

Whether one of the *Stone* majority would have found any of these differences legally compelling is questionable; perhaps none would have. It seems harsh, however, to condemn virtually all of the Indiana State Senators as enemies of the Constitution for seeking to find out the answer to that question.

While a protest of the *Stone* holding and a test of its limits, the Indiana Senate bill did not purport directly to challenge Supreme Court authority. Indeed, the bill explicitly acknowledged the authority of any court, state or federal, to invalidate its provisions on constitutional grounds. The bill provided: "If this section is determined to be unconstitutional all copies of the Ten Commandments displayed by authority of this section shall be immediately removed when the judgment becomes final." This provision (similar to language often included in Federal legislation, as for example in the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act) hardly demonstrates a refusal by the Indiana Senate to obey the mandates of the courts. Moreover, as Mr. Manion has testified, the State Senate bill, had it progressed to the Governor's desk, would not have been signed into law without an opinion from the Indiana Attorney General that it was, in fact, constitutional.

Whatever the legal merits of the Bill with regard to caselaw, however, certainly the role of a legislator in voting on legislation that he or she believes to be constitutional is quite different from the role of a Federal judge bound by Supreme Court precedent in deciding a case. The distinction is well-illustrated by Abraham Lincoln's discussion of the infamous *Dred Scott* case during the Lincoln-Douglas debates:

> If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that Dred Scott decision, I would vote that it should.

Lincoln was right: that legislators have an independent duty to consider the constitutionality of proposed legislation has long been the position of the American legal mainstream. (Indeed, if this belief were not accepted, the Supreme Court once having rendered a vague or, in its more considered view, an incorrect opinion might never have the opportunity to clarify its position.) Again, the Indiana Senate disobeyed no court order; quite the reverse, it specifically indicated that it would accede to any court ruling on the constitutionality of its new approach to a vexing problem.

Mr. Manion testified that he "totally endorse[s]" the principle that Federal appellate courts are bound by Supreme Court precedent, and nothing in his service in the Indiana Senate casts doubt upon that affirmation.

Further, criticism of Mr. Manion was aired because he introduced a bill in the Indiana Senate which would permit the teaching of creation science in the schools along with the theory of evolution. Obviously, the constitutionality of such legislation has not been resolved. The Supreme Court has just recently agreed to hear

a case on the subject next term. (*Edwards* v. *Aguillard*, Docket No. 85–1513.)

Although selective criticism has been lodged against him with regard to his service in the Indiana legislature, no comment has been made concerning his overall legislative effort. An unbiased review would reveal that he introduced and sponsored bills which even his opponents would consider thoughtful, necessary and fair. Examples of this legislation include bills authorizing halfway houses for certain incarcerated individuals, protecting the rights of juveniles, and dealing with the promotion of alternative sources of energy opposed by large utility companies.

OPPOSITION TO MR. MANION'S NOMINATION INAPPROPRIATELY FOCUSES ON IDEOLOGICAL ISSUES

Critics have raised miscellaneous objections in an attempt to discredit Mr. Manion's fitness for the bench. Most of the objections focus on ideological issues. In the first case, we maintain that the nomination process should not be perverted into a political litmus test. Furthermore, in this case, the objections center not on Mr. Manion's own ideological and political views but to those attributed to him by association. Finally, a careful examination of each objection reveals that it is based upon an incomplete or distorted representation of the facts.

A. Condolence Letter

Mr. Manion is criticized for stating in a letter to The American Opinion Bookstore that its members were on the front line of the fight for constitutional freedom. Immediately after his father's death, Mr. Manion responded to many condolence letters. The letter to The American Opinion Bookstore (a small John Birch Society bookstore located in Elkhart, Indiana) was such a response. Mr. Manion has stated that his remarks were intended only to appropriately respond to an expression of sympathy from his father's admirers.

Mr. Manion is not now, nor has he ever been, a member of the John Birch Society.

B. The Manion Forum

Various accusations have been leveled against Mr. Manion with regard to statements made in connection with the radio and television program *The Manion Forum*. *The Manion Forum* was a program conceived and produced by Clarence Manion, the nominee's father and the former dean of the University of Notre Dame Law School. The purpose of the program was to provide a forum for conservatives who might not otherwise be heard, to voice their views. Many of the questions asked of Daniel Manion at his confirmation hearings were in fact based on the views expressed by Clarence Manion and the late Congressman Larry McDonald, who had been interviewed on *The Manion Forum*. Daniel Manion's role was that of an interviewer, and he so testified at his hearing.

In this connection, accusations have been made that he is now recanting public statements that he made as an interviewer. We do not think this is a fair or appropriate characterization considering that his role on *The Manion Forum* was to make those being interviewed feel at ease and willing to express their opinions. Daniel Manion testified at his hearing to his own convictions and beliefs.

QUALITY OF WORK PRODUCT

At some point in the confirmation process a change occurred in the approach taken by those opposed to Mr Manion's appointment. After weeks of emphasis on ideological differences, his opponents began to focus on alleged lack of quality, citing lack of Federal experience, absence of scholarly works, and a work product lacking in acceptable grammar and spelling.

While briefs submitted to the minority are described by them as his best efforts, Mr. Manion has indicated that he was requested to respond under severe time constraints. He submitted them with the caveat that he knew there were typographical errors, that the briefs were unedited, and that his selection was intended to show the current diversity of his work. The Chicago Council of Lawyers has provided the critiques of the briefs. These critiques are unsigned but were prepared by various members of the Council. The critiques are short and concentrate on misspelled words and alleged faulty English composition. Comments on legal content or effectiveness are few, other than unsubstantiated or undemonstrated criticism. No statement is made by the Chicago Council as to the outcome of Mr. Manion's efforts. However, Mr. Manion has advised us that as a result of these briefs, his clients have prevailed in three actions, one was unsuccessful, and one is still pending. We think this to be better criteria by which to rate an individual's legal capabilities.

Additionally, lawyers generally work under severe time constraints. Keep in mind that Mr. Manion practices law in a comparatively small town with a small firm. The resources of such a firm cannot be compared to those of large firms in the areas of equipment and numbers of support personnel.

CONCLUSION

We believe that when taken in context it becomes clear that opposition to the nomination of Daniel Manion is rooted in ideology. We must rise above the temptation to pervert the advice and consent process by making it into a litmus test for either liberal or conservative interests.

Mr. Manion's reputation for honesty and integrity is unquestioned. There is no hint of any impropriety or wrong-doing in his background. Even his most strident critics have to admit that he is a fair and just individual. The ABA found his professional background to qualify him for serving on the Court of Appeals. We believe that Daniel A. Manion will bring to the Seventh Circuit Court

of Appeals an excellent background consisting of a broad litigation practice and experience as a state legislator. Mr. Manion is clearly qualified and should be confirmed by the Senate.

STROM THURMOND.
PAUL LAXALT.
ORRIN G. HATCH.
ALAN K. SIMPSON.
JOHN P. EAST.
CHARLES E. GRASSLEY.
JEREMIAH DENTON.
MITCH MCCONNELL.

SEPARATE VIEWS OF MR. MATHIAS REGARDING THE NOMINATION OF DANIEL MANION TO THE SEVENTH CIRCUIT COURT OF APPEALS

Despite the Supreme Court's preeminence with the Federal judiciary, as a practical matter the Circuit Court of Appeals render the final decisions in the vast majority of Federal cases. For that reason, the consideration of nominations to these courts is one of the most important responsibilities of the Senate Judiciary Committee.

After a thorough review of Daniel A. Manion's legal and legislative career, I voted against confirmation of his nomination to the Seventh Circuit Court of Appeals. I did so for two reasons.

First, I believe that a circuit judge should have stronger qualifications than those Mr. Manion presented. While the nominee has had some litigation experience, it has generally been confined to the state courts. He has never appeared before the court to which he was nominated, and never argued a case involving a Federal constitutional issue. Nor has he distinguished himself with academic achievement or scholarly publications. On the contrary, the briefs that he submitted to the Committee as samples of his work are not distinguished. Mr. Manion may have the outstanding credentials and skills that we should be looking for in a U.S. Circuit Judge, but that fact is not conspicuous.

Second, I was concerned about Mr. Manion's ability to set aside his strongly held personal and political beliefs and apply the law of the land impartially and objectively. I am sure that he would strive to do so, but I am not confident that he would succeed. In fact, the evidence of record on this issue is not encouraging. In 1981, when Mr. Manion was an Indiana State Senator, he cosponsored a bill to permit the posting in the public schools of contributed copies of the Ten Commandments. He told the Committee that he knew at the time that the Supreme Court had ruled 2 months earlier in *Stone* v. *Graham* that a similar Kentucky statute was unconstitutional. Mr. Manion explained that he cosponsored the bill to show "legislative prerogative" or as a "legislative protest." He also explained that had he been the Attorney General of Indiana with responsibility for advising the Governor on whether to sign the bill into law, he "probably" would have relied on the Supreme Court's decision in the Kentucky case to discourage the Governor from doing so.

As a State legislator, Mr. Manion was bound by oath, taken pursuant to article VI, section 3 of the U.S. Constitution, to support that Constitution as interpreted by the Supreme Court. Yet by his own admission, Mr. Manion proposed an unconstitutional bill. We must conclude that he acted, not through ignorance of the supreme law of the land, but from indifference to its demands. Subjugating one's personal views to the duties of the bench is one of the most

difficult responsibilities of a judge, and this incident made me doubt that Mr. Manion could fulfill it.

Mr. Manion's testimony before the Committee did little to dispel these doubts. Mr. Manion acknowledged that if confirmed he would not have the power to overrule a Supreme Court decision. However, he was eager to note that he could criticize a decision, point out any obsolescence, problem or defect, or deviate from the decision if the facts in the two cases were different. While his answer is not incorrect, the tone is disconcerting. The real concern is whether, as a Circuit Judge, he would be sufficiently deferential to the Supreme Court. This concern was exacerbated by his statement that a Supreme Court decision was not "law of the land" but was actually *stare decisis,* which Mr. Manion perceived as "law of the case". This position seemed too close to the universally discredited doctrine that Supreme Court decisions apply only to the case at hand, and do not stand as the supreme law of the land.

Mr. Manion's nomination presents a close question, on the record as a whole I was in doubt that Mr. Manion would be comfortable under the restraints and discipline of the life of a judge of a U.S. Court of Appeals, without regard to his qualifications in other respects.

Having concluded that Mr. Manion's nomination should not be approved, I also voted not to report the nomination without any recommendation. The Senate has a right to expect that the Judiciary Committee, with its expertise in the field of judicial nominations will not avoid its responsibilities in this area by presenting to the full Senate a nomination that a majority of the Committee could not support.

ADDITIONAL VIEWS OF MR. SPECTER REGARDING THE NOMINATION OF DANIEL MANION TO THE SEVENTH CIRCUIT COURT OF APPEALS

Senator Specter, at the Committee meeting at which the nomination of Daniel A. Manion was considered, stated:

> I am voting against the nomination of Mr. Manion because I believe that the views he has expressed on the authority, integrity and proper role of the Federal judiciary, including the Supreme Court of the United States, are incompatible with service as a Federal judge.

Ex. Rpt. 99-16 --- 2

MINORITY VIEWS OF MESSRS. BIDEN, KENNEDY, METZENBAUM, LEAHY, AND SIMON REGARDING THE NOMINATION OF DANIEL A. MANION TO THE SEVENTH CIRCUIT COURT OF APPEALS

I. SUMMARY

The nomination of Daniel A. Manion to be a judge on the U.S. Court of Appeals for the Seventh Circuit places the constitutional role of the Senate in rendering "advice and consent" in clear perspective. Since 1981, the Senate has confirmed 59 nominees to the courts of appeals and 205 appointments to the Federal district courts. Only four nominations during this period have required rollcall votes. While most of these nominees share a conservative judicial philosophy closely in tune with that held by President Reagan, they have been approved by the Senate, Democrats, and Republicans alike, by virtue of their professional and personal qualifications.

All of those who voted in Committee to disapprove Mr. Manion's nomination favored the confirmation of Judge Robert Bork and Antonin Scalia to the D.C. Circuit Court of Appeals, Richard Posner, Frank Easterbrook, and Kenneth Ripple to the Seventh Circuit and Ralph Winter to the Second Circuit, notwithstanding their reputations as "conservatives." More recently, we supported the confirmation of John Noonan to the Ninth Circuit, J. Daniel Mahoney, who served as chairman of the New York Conservative Party immediately prior to his nomination to the Second Circuit, and J.C. Edmundson to the Eleventh Circuit. Each of these appointees were experienced Federal practitioners, eminent jurists or respected academics.

When, however, a nominee fails to demonstrate that he or she possesses a significant degree of achievement and excellence in the law and a fundamental understanding of the Constitution sufficient to qualify for this most important position, it is the Senate's obligation to reject the nomination. Mr. Manion's deficient qualifications to be a Federal circuit court judge require the Senate to take such action. Casting this debate in ideological terms misses the point of the objecitons raised. Excellence, not mediocrity, must be the standard for all members of the Federal judiciary.

Mr. Manion's nomination was pending before this Committee for 2½ months. Two hearings were held. Mr. Manion had a full opportunity to demonstrate that he possessed the intellect and impartiality which are inherent qualifications for this life-tenured job, but we believe he failed to do so. Rather, we are compelled to find that, at best, this nominee is merely an undistinguished lawyer whose personal character is not at issue. That assessment is not nearly good enough for the high position of public trust to which Mr. Manion has been nominated.0

Beyond Daniel Manion's basic competence, there is a further disturbing aspect of his candidacy relating to his failure to respect the Constitution and the role of the Federal courts in enforcing it. For example, in 1981, as a State legislator, Daniel Manion, in defiance of an earlier decision of the U.S. Supreme Court, cosponsored a bill he knew to be unconstitutional. In so doing, Mr. Manion allowed his personal notion of what the law should be to override his solemn oath as a public official to uphold the Constitution. Such concerted disregard for the supremacy of the Constitution and the decisions of the Supreme Court leave us in doubt as to the credibility of his recently stated pledge to abide by the decisions of the Court.

Finally, it is the obligation of members of this Committee to convey to the Senate as a whole our impression of the nominee when he appeared personally before us during his confirmation hearing. We had the unique opportunity to review not only the candidate's on-the-record responses, but his attitude and demeanor as well. With disturbing frequency, Mr. Manion either did not recall or attempted to evade responsibility for numerous earlier statements and beliefs he had held during his public and professional career. While perhaps no single lapse of memory or disavowal necessarily would be of consequence, in our opinion, the total picture raises serious doubt as to the credibility and forthrightness of the nominee. The Senate is not obligated to confirm Mr. Manion merely because he stated under oath that he would uphold the Constitution. It is completely appropriate to examine the totality of an individual's career, including past actions and statements, to determine whether that pledge to uphold the Constitution is, in fact, credible. The burden of proof is on the nominee to make such a showing. In our estimation, Mr. Manion's testimony did not erase our doubts.

The following report sets forth the substance of the information disclosed by the record and presents our reasons for opposing this appointment. We are unanimous in urging the full Senate to vote against this nomination.

II. The Nominee is Not Qualified for Appointment to the U.S. Court of Appeals for the Seventh Circuit

A. INTRODUCTION

The Federal appeals courts are the courts of last resort for the overwhelming majority of litigants. They are too vital to be burdened by the appointment of persons whose qualifications are subject to serious question. Daniel Manion has not demonstrated the standard of excellence that must be demanded of those chosen to serve on the Nation's second highest court.

Our concern is not with academic degrees or with scholarly publications. It is simply that a nominee must demonstrate affirmatively the high degree of achievement and excellence in the law expected of our Federal judges. Professor Philip B. Kurland, an eminent legal scholar and the William R. Kenan Distinguished Service Professor at the University of Chicago, noted that the "burden of persuasion ought to be borne by the nomination, given the impor-

tance of the post and the life tenure that attaches to it."[1] Unfortunately, Mr. Manion has not met that burden.

Recently Professor Kurland and Laurence Tribe, a distinguished constitutional expert and Tyler Professor of Law at Harvard University, joined together in a letter to members of the Judiciary Committee urging us to look more carefully at the qualifications of nominees to the federal courts. This joint effort to define standards by which the Senate can measure nominees is particularly significant because of the differing philosophical perspectives of these widely respected constitutional scholars. In emphasizing the role that excellence must play in the evaluation of any appointee to the Federal bench, Professors Kurland and Tribe stated the following:

> The federal courts play an increasingly critical part in American government. The men and women of the federal bench must possess open minds that are capable of grasping sophisticated legal analysis, and that can grapple intelligently with fundamental constitutional issues. To federal judges is given the task of policing the boundaries between state and federal government, of giving principled articulation to the content of the basic human rights protected by the Constitution, of enforcing the myriad and complex federal statutes and regulations, and of overseeing complicated commercial and criminal litigation. Senators therefore have a duty, both to the Constitution and to the nation's citizens, businesses, and public and private institutions, to ensure that the President's nominees have the experience, the talent, the intellectual acumen, and the fairness of mind to perform their functions . . .[2]

B. MR. MANION LACKS PROFESSIONAL COMPETENCE

Serious questions regarding Mr. Manion's lack of professional distinction and capacity to deal capably with the complex matters that come before the Seventh Circuit were first raised by leaders of the bar familiar with his record and experience. A majority of the American Bar Association Standing Committee on the Federal Judiciary rated Mr. Manion only as "qualified", the lowest possible approval rating. A minority of the ABA Committee found he was "not qualified" to serve on the Federal appeals court.

Mr. Manion also was evaluated by the Chicago Council of Lawyers. The Council is an organization of one thousand attorneys in Chicago, the largest city in the three States comprising the Seventh Circuit, who practice regularly before the court. Finding that Mr. Manion "would not be able to deal adequately with the difficult legal issues which are routinely presented to the Seventh Circuit," the Council concluded that he was "not qualified" to be a Federal appeals court judge.[3] That conclusion is fully supported by the record before the Committee.

First, Mr. Manion lacks demonstrated excellence or achievement in any area of the law. He has little, if any, experience in dealing with Federal constitutional or public law issues. In fact, he has *never* argued a case before the Seventh Circuit (or any other Feder-

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al appeals court) and has been first chair in few, if any, *trials* in Federal district court.

Mr. Manion's legal experience consists primarily of representation of clients in small personal and commercial claims, particularly in land condemnation cases, in State court. As Manion acknowledged in his response to the Committee's questionnaire, many of his court appearances occurred earlier in his career, when he handled litigation which he described as "collections in small claims." Indeed, the full extent of Manion's Federal trial practice has been limited to be a handful of diversity jurisdiction cases involving issues of State law. In every one of those Federal trials, Mr. Manion served only as co-counsel with another attorney.[4]

Second, of the 10 cases Mr. Manion identified in his response to the Committee's questionnaire as "the *most significant*" in his 13-year legal career, 8 were in State court. These cases included:

(a) defense of a claim that Mr. Manion's client had improperly repaired a Volkswagen Rabbit, resulting in poor gas mileage and overall interior performance;

(b) two land condemnation actions, in one of which the issue was whether the injury caused by erection of a fence totaled $8,000, as claimed by the private landowner, or $193.00 as asserted by the State;

(c) defense of a claim that a truck driver was liable for damage to his cargo when his truck hit a "dip" in the road;

(d) an automobile accident case in which the controlling issue was whether a state flagman at a construction site had waved the plaintiff into an intersection where his car was hit by another vehicle.

Third, and most significant, Mr. Manion's legal briefs demonstrate a pervasive lack of technical ability, craftsmanship, attention to detail, and reasoning. Mr. Manion submitted copies of five of his *best* briefs to the Committee in response to a staff request. Those briefs were also reviewed by several independent attorneys at the behest of the Chicago Council of Lawyers. In each case, the attorneys found that Mr. Manion's writing fell far short of the standard that should be expected of a Federal appeals court judge. Professors Kurland and Tribe have well articulated why technical competence is so important—Federal appeals court judges are "expected to contribute lucidly to a body of precedents that can enlighten and guide trial courts, litigants and those who must anticipate what courts will do." [5]

The Council's comment on Mr. Manion's brief in *Lindower* v. *City of South Bend* was typical of those analyses:

> [T]his brief . . . demonstrates a low level of competency compared to the excellence to which the judiciary and the public are entitled. . . The numerous typographical errors, grammatical mistakes, and syntactical errors in this brief raise concerns about Mr. Manion's ability to write, a key qualification for a judge of the Court of Appeals. . .

Review of Mr. Manion's other briefs yielded similar conclusions. For example, the Council's comment on Mr. Manion's brief in *Culver Education Foundation* v. *Indiana Civil Rights Commission* states:

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> [T]he brief thoroughly fails to communicate Mr. Manion's arguments in any effective manner. The brief is poorly organized, and contains numerous syntactical, spelling and punctuation errors. . . In some instances . . . these errors indicate a certain carelessness in proofreading by Mr. Manion. In most other instances, however, the errors simply seem to demonstrate an inability to spell. Mr. Manion appears to have some difficulty in using the possessive form of nouns.

The Chicago Council of Lawyers analyses of Mr. Manion's briefs are set forth in Appendix A to this report.[6]

Any nominee, of course, may lack experience in some of the various types of cases which come before the Federal courts. But every nominee should have unquestioned expertise regarding a substantial portion of the Federal court docket, and demonstrate a degree of excellence in that area of expertise. Mr. Manion possesses neither of these essential qualifications.

Mr. Manion's supporters have argued that, if confirmed as a member of the Court of Appeals, Mr. Manion will learn about Federal law while deciding cases and that his writing will, in time, improve.[7] The job of a Federal appeals court judge requires someone with strong legal skills and a solid base of legal experience and training. The Seventh Circuit Court of Appeals is not the place for on-the-job training. In 1985, each member of the Seventh Circuit Court of Appeals took part in more than five hundred decisions, and personally wrote approximately fifty opinions.[8]

The impact on the lives of the 22 million people in the Seventh Circuit of appointing Daniel Manion to the Federal appeals court cannot be overemphasized. For all practical purposes, the Seventh Circuit has the final responsibility for protecting the constitutional rights of those people. In 1985, the Federal appeals courts decided 31,385 cases; 2,259 of those decisions were handed down by the Seventh Circuit alone.[9] The U.S. Supreme Court only is able to hear and resolve approximately 150 cases annually, of which a small percentage ordinarily can be taken from any one circuit.[10]

Federal litigants in the Seventh Circuit should not be at risk in order to provide on-the-job training for Mr. Manion or any other nominee. It is as a practicing lawyer, not as a sitting judge, that an attorney should acquire the knowledge and experience necessary to serve as a member of a U.S. Court of Appeals.

C. MR. MANION'S QUALIFICATIONS DO NOT MEASURE UP TO OTHER NOMINEES

Mr. Manion's qualifications are particularly objectionable when measured against the credentials of current judges of the Seventh Circuit or even of other judicial nominees appointed during the second term of this administration. Attached, as Appendix B and C to these views, are synopses of the academic credentials and legal experience of the current judges of the Seventh Circuit, and of the 59 persons who have been appointed to the Federal appeals courts and confirmed by the Senate since January, 1981, respectively. We are not unanimous in believing that all of those appointed since 1981 have possessed the requisite combination of experience and

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temperament to sit on a federal appellate court. However, all of those confirmed by the Senate have demonstrated a certain mix of intellectual achievement and legal experience in the kinds of complex and difficult matters which are argued before one of the highest courts in the nation, and their qualifications are clearly superior to the qualifications of Mr. Manion.

Mr. Manion's nomination calls upon the Senate to abandon the last vestiges of its historical insistence upon excellence and achievement in the law. His lack of the requisite qualifications is sufficient reason not to approve his nomination.

III. The Nominee Fails To Understand the Constitution and the Role of Federal Courts in Enforcing it

Article VI of the Constitution provides that *all* State and Federal officials "shall be bound by oath or affirmation to support this Constitution." Mr. Manion assumed that solemn obligation in November, 1978, when he took his oath of office as a member of the Indiana Senate.

However, in January, 1981, Mr. Manion, as a State legislator, cosponsored a bill *he says he knew was unconstitutional.*[11] That bill authorized the posting of the Ten Commandments in public schools throughout the State, and was cosponsored by Manion and others 2 months after the U.S. Supreme Court had invalidated a virtually identical Kentucky statute in the case of *Stone* v. *Graham*, 449 U.S. 39 (1980).[12]

At his confirmation hearing, Mr. Manion expressed reluctance to accept Supreme Court decisions as the "supreme law of the land," saying that he preferred to view them as *stare decisis* which must be followed by lower Federal courts.[13] Such reasoning leads to the conclusion that State and Federal officials are not constitutionally bound to follow the Supreme Court's interpretation of the Constitution. Under this view a constitutional issue would have to be litigated over and over again before all Americans could be assured of that particular right. Mr. Manion's interpretation of Supreme Court decisions is at best troubling. The principle that Supreme Court decisions establish the supreme law of the land which must be followed by all lower Federal courts as well as by all public officials is nearly as old as the Constitution itself. Article VI of the Constitution renders the Constitution supreme, and as early as 1803, Chief Justice Marshall, speaking for a unanimous Court in *Marbury* v. *Madison*, noted that "it is emphatically the province and duty of the judicial department to say what the law is." That decision declared that the Constitution and the interpretation of it by the Supreme Court are the fundamental and paramount law of the land.

Mr. Manion's action, in introducing legislation he knew to be unconstitutional, demonstrates a clear refusal to respect the article VI oath to enforce the Constitution which he had taken as a State senator. The Founding Fathers regarded the article VI oath as an essential part of their plan to erect an effective national govern-

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ment, the enforcement of whose laws were not dependent on the whims of the States.[14] Thus, together with substantive and political considerations, every legislator has the obligation to weigh the constitutionality of proposed legislation. The reason for that is obvious. The Constitution is not a self-executing document and its viability as the "supreme law of the land" depends on the fidelity and faithfulness of those who are entrusted with governmental power.

Each of us, of course, has differed at times with the decisions of the Supreme Court, and not all of us would agree with the decision in *Stone* v. *Graham.* But, after November 17, 1980, *Stone* v. *Graham* was the law of the land and every public official was obligated to obey it. Consequently, Mr. Manion's justifications of his actions as "legislative prerogative" and "legislative protest" are incompatible with the Constitution itself and evidence and unacceptable insensitivity to fundamental constitutional principles.

Sympathy for the religious principles that may have motivated Mr. Manion cannot blind us to the unacceptability of his action. We all can recall an era, not too long ago, when other State officials chose to disregard other Supreme Court decisions with which they disagreed, particularly *Brown* v. *Board of Education.* Twenty-six years ago, the legislature of Arkansas, which disagreed with *Brown* v. *Board of Education* as deeply as Mr. Manion disagreed with *Stone* v. *Graham,* adopted a series of measures to maintain racial segregation in that State's schools generally, and at Central High School in Little Rock, in particular. In striking down that defiance of *Brown,* a *unanimous* Supreme Court in an opinion separately signed by each individual Justice held:

> No state legislator or executive can war against the Constitution without violating his undertaking to support it. . . . If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery.

Cooper v. *Aaron,* 358 U.S. 1, 18 (1958).

Justice Frankfurter, in a concurring opinion, condemned the action of state officials in refusing to comply voluntarily with the decision in *Brown.* Justice Frankfurter warned:

> Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme Law, precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years.

358 U.S. at 26.

Based on those fundamental principles, we only can conclude that Mr. Manion, as a State legislator, had no "legislative preroga-

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tive" to cosponsor a bill which he knew was unconstitutional and that to do so is an impermissible form of "legislative protest."

Mr. Manion now says in retrospect that his "legislative protest" of the decision of the Supreme Court in *Stone* v. *Graham* might better have been filed as a resolution than as a bill. *Nevertheless,* he still holds the extraordinary view that the bill, if passed, would have been the law until it was ruled unconstitutional by the courts, thereby implying that there was some power in the State of Indiana which, when asserted, could nullify federal constitutional law.[15]

In sum, during his tenure as a State legislator, Mr. Manion substituted his own personal notion of what the law should be for the established rule as enunciated by the Supreme Court. In so doing, Manion cavalierly disregarded his oath of office to uphold the Constitution.[16] We believe that such concerted disregard for the supremacy of the Constitution and the decisions of the Supreme Court disqualifies him to serve as a Federal appeals court judge.

IV. The Nominee Did Not Demonstrate the Degree of Credibility That Is Essential for Candidates for the Federal Bench

The confirmation hearing offers a special environment for evaluating a nominee's response to careful inquiry by concerned members of the Committee. We have the unique opportunity to review not only the substance of the candidate's verbal responses, but his attitude and demeanor as well. We believe it is incumbent upon members of the Committee to share this perspective with other Members of the Senate.

During his confirmation hearing, Mr. Manion either did not remember or attempted to evade responsibility for numerous earlier statements and beliefs he had held during his public and professional career. These memory lapses and evasions have placed members of the Committee in a difficult position. We must decide if it is sufficient to accept the nominees's stated promise to enforce the law in the context of his previous personal views and professional activities.

Ordinarily, we would examine a nominee's views on American jurisprudence by reference to his published legal and scholarly writings. That was not possible for this nominee because he has published no legal or scholarly articles during his career.

Moreover, although Mr. Manion has given 400 to 500 public speeches, he has advised the Committee that he has no texts of any of those remarks.

In an effort to learn more about Mr. Manion's views on the Constitution and the role of Federal courts in our constitutional government, we looked to the only sources available. First, the Committee reviewed and questioned Mr. Manion about verbatim transcripts of radio and television broadcasts of the Manion Forum in which he participated. Second, the Committee took note of a book entitled "We Hold These Truths," which Mr. Manion wholeheartedly endorsed in two broadcast statements in 1977, one year before he was elected to the Indiana State Senate.

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A. ENDORSEMENT OF "WE HOLD THESE TRUTHS"

A disturbing series of responses came during Mr. Manion's explanation of his endorsement of the late Congressman Larry McDonald's book, "We Hold These Truths." [17] Mr. Manion's views on this book were of particular interest to members of the Committee due to the extreme nature of many of Dr. McDonald's arguments. Among other points, Dr. McDonald contended that:

> In the landmark Supreme Court decision in *Brown* v. *Board of Education*, ". . . the Court arrogated unto itself authority that was superior not only to that of Congress and the President, but also to that of the Constitution itself."[18]
>
> "A Supreme Court decision is not the law of the land."[19]
>
> "The Civil Rights Act of 1964 is unconstitutional."[20]

Mr. Manion interviewed Dr. McDonald in 1977 during a radio program sponsored by the Manion Forum, a show he sometimes cohosted. During this interview, the nominee endorsed "We Hold These Truths" with the following praise:

> My personal observation is that it is one of the finest summaries of the history of our country—what has happened in the past, what happened to us and what we have to do about it.[21]
>
> In your book you bring down some very justified criticism of the Supreme Court that interprets the Constitution.
>
> We hope that other people in Congress, as well as all of the people listening to this program will read your book "We Hold These Truths," so that they will realize that solutions to our problems are available.[22]

Such strong recommendations seem to indicate that Mr. Manion not only had closely read Dr. McDonald's book, but had endorsed many of its controversial concepts. Beyond this, Mr. Manion had publicly discussed his agreement with several of the themes of that book.

However, during his confirmation hearing when Mr. Manion was asked about this book and his interview of Congressman McDonald, he stated that he had little recollection of either. Mr. Manion took exception to the Committee's concern about "We Hold These Truths," insisting that he had praised the book only out of politeness to a guest on his show. Although Mr. Manion insisted that he disagreed with many of the constitutional doctrines and "solutions" set forth in the book, we see no reason to take his comments any less seriously than his audience surely did.

B. REPUDIATION OF THE INCORPORATION DOCTRINE

The doctrine of selective incorporation is an interpretation of the fourteenth amendment that made the core protections of the Bill of Rights binding on the States. Over the last 60 years, the Supreme Court has held that essential protections in the Bill of Rights are embraced in the "due process of law" guaranteed by the fourteenth amendment. No sitting Justice on the Supreme Court disagrees with this. With respect to the first amendment's guarantees of free speech, press and religion, no member of the Court in the last 60

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years has challenged the applicability of these guarantees to State officials.

As Justice Stevens noted in *Wallace* v. *Jaffree*:

> . . . [I]t is appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several states have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.

Although Mr. Manion has never published a scholarly paper on this subject, on several occasions he has made statements and participated in efforts that express outright contempt for this long-established legal doctrine.

In 1971, Mr. Manion indicated he believed that there was "no foundation" for the decisions of the Supreme Court incorporating into the fourteenth amendment most of the fundamental guarantees of the Bill of Rights. He also asserted that Supreme Court decisions forbidding the States to establish or sponsor religious activities or organizations were "precedented fallaciously" and that the constitutional requirement of separation of church and state only applies to the National Government.[23]

At the April 30, 1986, confirmation hearing Mr. Manion agreed that at one time he had disapproved of the incorporation doctrine because it was inconsistent with his idea of federalism.[24] He testified, however, that he since had changed his mind, and described his present position in several different ways.

First, Mr. Manion testified that he was "now" convinced that the protections of the establishment clause of the first amendment do apply to the States.[25] Second, Mr. Manion argued for retention of the incorporation doctrine as a matter of *stare decisis,* stating it "has become so integrated into our judicial decisions that I think it would be very difficult to overrule," although he added that "the Supreme Court could dissect it somewhat if it chose to do so." [26] Third, he testified that he had "no idea" whether he would seek to disincorporate any fundamental rights.[27]

C. PRAISE OF THE JOHN BIRCH SOCIETY

Our concern over the nominee's credibility is also based on Mr. Manion's responses to questions about his praise for the John Birch Society. On August 27, 1979, Mr. Manion wrote a letter to the American Opinion Bookstore in Elkhart, Indiana, which is the local headquarters of the John Birch Society. The letter, a response to condolences regarding the death of Mr. Manion's father, stated in part:

> Your members are certainly the people who are on the front line of the fight for Constitutional Freedom . . .
>
> Keep up your good work. Since I represent two townships in Elkhart, I would be happy to help you in whatever causes you may have before the State Legislature.[28]

During his confirmation hearing, however, Mr. Manion insisted that this letter did not indicate that he actually agreed with any of the positions of the John Birch Society, testifying "I do not have any idea . . . I could not tell you what the policies of the John Birch Society are." [29] Mr. Manion went on to state, "I do not know

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. . . what their stands are on the Constitution or any other issue of current affairs." [30]

Mr. Manion's praise of the Society's "good work," and his encouragement of its "fight for Constitutional Freedom" indicate, however, that he had an understanding of their views when he wrote the letter in 1979. While Mr. Manion himself was not a member of the John Birch Society, it is difficult to believe that he has had no exposure to the views and doctrines espoused by this highly controversial group.[31] Moreover, in 1979, Mr. Manion was a member of the Indiana Legislature. A public servant at any level is undoubtedly aware of the views of controversial organizations that he praises and offers to support. We believe the nominee was less than candid in his explanation of his praise for this organization at the time he was an elected public official.

D. SUMMARY

In sum, at his April 30, 1986, confirmation hearing, Mr. Manion denounced most of the positions to which he had adhered in the past. Mr. Manion insisted that, even though as a Federal judge he might criticize decisions of the Supreme Court, he would obey the Court's mandates.

In explaining his 1981 cosponsorship of the legislation that admittedly violated *Stone* v. *Graham*, Mr. Manion emphasized that "I was not *then*" a nominee for a Federal judgeship.[32] At the April 30, 1986, confirmation hearing, Mr. Manion's views of the application of the Bill of Rights to the States all had undergone a major transformation. At that hearing Mr. Manion systematically and categorically repudiated much of his own record, and asked the Committee to act on his newly professed convictions.

We are unwilling to do so. The Senate should give little weight to views first expressed only when a nominee comes before the Senate Judiciary Committee seeking confirmation for a high Federal office. No nominee in possession of his or her sense would fail to promise to obey the decisions of the Supreme Court, because a refusal to do so predictably would result in swift and certain rejection. It always will be possible for a nominee to disavow some past position, or to espouse a view which might put in a better light an earlier remark; such eleventh hour protestations should not be credited when they are at odds with the record. We believe that the best guide to the convictions of a nominee are the actions he or she took and the statements he or she made before coming under consideration for a Federal judgeship. In the case of Mr. Manion, those actions and statements clearly require that the Senate decline to confirm him as a member of the U.S. Court of Appeals.

V. Conclusion

Mr. Manion is not qualified to be a Federal appeals court judge and the Senate should not consent to his nomination.

Joseph R. Biden, Jr.
Edward M. Kennedy.
Howard M. Metzenbaum.
Patrick J. Leahy.
Paul Simon.

FOOTNOTES

[1] "A 'Scotch Verdict' on a Judgeship," Philip B. Kurland, *Chicago Tribune*, May 18, 1986.

[2] Letter from Prof. Philip Kurland and Prof. Laurence Tribe to the Senate Judiciary Committee, June 1, 1986, p. 2. (Letter is attached as Appendix D.)

[3] Letter from Chicago Council of Lawyers to Senator Paul Simon, April 9, 1985, p. 2.

[4] Transcript of April 30, 1986, hearing, pp. 56, 63, 118–19. Proponents of Mr. Manion's nomination state he served as a "Deputy Attorney General for the State of Indiana in 1973 and 1974." However, according to Mr. Manion's response to the Committee questionnaire, he was a Deputy Attorney General for only 6 months and was assigned to land condemnation cases. Mr. Manion was a *clerk* in the Attorney General's Office when he was assigned to the criminal appellate and administrative sections.

[5] Kurland, Tribe letter, *op. cip.*, p. 2.

[6] The Chicago Council set forth their analyses of Mr. Manion's briefs in two letters, dated April 29, 1986, and May 6, 1986, to Senator Simon. Those two letters were combined into one letter, dated May 20, 1986, which is set forth as Appendix A to this report.

[7] Transcript of May 8, 1986 business meeting of the Committee on the Judiciary, p. 31.

[8] "Federal Court Management Statistics—1985," Prepared by the Administrative Office of the United States Courts, p. 16.

[9] *Id.*, pp. 16, 30.

[10] "The Supreme Court, 1984 Term," 99 *Harv. L. Rev.* 1 November 1985, p. 329.

[11] Mr. Manion candidly acknowledged that, had the bill he cosponsored been enacted, "it would have to be declared unconstitutional . . ." and "Yes, I would say it would have been overturned. No question about it." Mr. Manion also testified that had he been the Indiana Attorney General, he "probably" would have relied on the decision in *Stone* v. *Graham* to advise the Governor *not* to approve the Indiana bill. (Transcript of April 30, 1986, hearing, pp. 46, 97, and 94 respectively). *See also*, Transcript of April 30, 1986, hearing, pp. 35, 45–46, 49.

[12] The Court held that "the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits." 449 U.S. at 42. The opinion made clear that the Ten Commandments could be included where appropriate in a study of history, civilization, ethics, or comparative religion. But the Court concluded that the permanent posting of the Ten Commandments, in classrooms and at times when they were irrelevant to the subjects under study, had a preeminently religious purpose, particularly since readers were admonished on a variety of entirely religious subjects, such as the proper method of worship, the avoidance of idolatry, and the keeping of the Sabbath Day. 449 U.S. at 41–42.

It is beyond peradventure that the Indiana bill was similar to the Kentucky statute in all material aspects. The Indiana bill, for example, specified that the document was to be the exact size required by the unconstitutional Kentucky law, "sixteen (16) inches wide and twenty (20) inches high." The bill also required that the posted copy include, in part, the following disclaimer attesting to its secular purpose: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." (Senate bill 245, section 2(c). This language was taken verbatim from the Kentucky law.

[13] Tanscript of April 30, 1986, hearing, p. 41 (emphasis added). *See also, id.*, p. 66.

[14] *See generally*, M. Farrand, *The Records of the Federal Convention of 1797*, v. ii, p. 88 (1966). During the Convention of 1787, Elbridge Gerry observed that under the Articles of Confederation "the officers of the (state) governments had considered them as distinct from, not as parts of the General System, and had in all cases . . . given a preference to the state governments. The proposed oaths will cure that error." (*Id.* v.i, p. 203.) Edmond Randolph argued that the oath was "necessary to prevent that competition between the national Constitution and laws and those of the particular states. which had already been felt. The officers of the States . . . ought to be . . . bound to the national government." In *The Federalist* Alexander Hamilton urged that the oath was needed because the cooperation of state officials was "essential . . . in giving effect to the federal constitution," and that "the sanctity of an oath" would join in "the enforcement of (national) laws." (Nos. 44 and 27, respectively.)

Moreover, Justice Story, who served on the Supreme Court with several of the men who originally framed and ratified the Constitution, explained that the Article VI oath was essential to assure loyalty to the National Government:

> It results from the plain right of society to require some guarantee from every officer that he will be conscientious in the discharge of his duty. Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those, who feel a deep sense of accountability to a Supreme being. If, in the ordinary administration of justice . . . oaths are required of those who try the cause . . . surely like guards ought to be interposed in the administration of high public trusts, and especially in such as may concern the welfare and safety of the whole community . . . The members and officers of the state governments have an essential agency in giving effect to the National Constitution . . . The executive authority of the several States may often be called upon to . . . allow rights, given by the Constitution . . . These . . . functions, devolving on the state authorities, render it highly important that they should be under solemn obligation to obey the Constitution."

See, J. Story, A Familiar Exposition of the Constitution of the United States, Section 462 (1847).

[15] Transcript of April 30, 1986 Hearing; pp. 44, 46, and 48–49. *Id.* at 45:

> Senator KENNEDY. Do you think . . . that if [enacted] this particular measure which you cosponsored . . . would have been the law of Indiana, even in the face of the Supreme Court decision?"
>
> Mr. MANION. Well, I think under the circumstances, it would have had to have been challenged and then overturned or ruled unconstitutional."

[16] Proponents of Mr. Manion's nomination argue that every legislator has an "independent" obligation to assess the constitutionality of proposed legislation. In this case, however, Mr. Manion conceded that the language of the Indiana bill cosponsored by Mr. Manion was taken largely verbatim from the Kentucky statute that had been declared unconstitutional less than 2 months earlier. Mr. Manion explained in his testimony that the purpose of the Indiana bill was to achieve that "same thing" as the unconstitutional Kentucky statute (Transcript of April 30, 1986, hearing, p. 92) and that the bill "was certainly an attempt to do exactly what . . . the Supreme Court said was not sufficient to make {the ten Commandments} a secular . . . as opposed to a religious document (Transcript of April 30, 1986, hearing, p. 39). Mr. Manion candidly acknowledged that, had the bill he cosponsored been enacted, "it would have to be declared unconstitutional . . ." (Transcript of April 30, 1986, hearing, p. 46); and that, "Yes, I would say it would have been overturned. No question about it." (Transcript of April 30, 1986, hearing, p. 97).

It is *important* to note that Mr. Manion, in his oral testimony before the committee stated "Yes, I would say it would have been overturned." After reviewing a transcript of the April 30, 1986 hearing, Mr. Manion revised his testimony to read ". . . it *probably* would have been overturned." The official transcript will reflect Mr. Manion's revision.

[17] Lawrence McDonald, "We Hold These Truths," Western Goals Endowment Fund (1984).

[18] "We Hold These Truths," p. 95. With regard to *Brown*, Mr. Manion testified that "I think that is the law, and I think it has been carefully followed. I do not have any quarrel with that." Transcript of April 30, 1986, hearing, p. 68.

[19] "We Hold These Truths," p. 95.

[20] "We Hold These Truths," pp. 95–96.

[21] Manion Forum Transcript No. 1172, March 27, 1977, p.1. *Compare,* Manion Forum Transcript No. 338.

[22] Manion Forum Transcript No. 1173, April 3, 1977, p. 4.

[23] Manion Forum TV Broadcast #334, pp. 2–4:

> DEAN MANION. Is the act of the New York legislature ruled out by the language which you just read in the first amendment?
>
> DAN MANION. No, that only applies to the national level.
>
> DEAN MANION. Congress shall pass no law. Does it say there that the New York's legislature shall not pass any law?
>
> DAN MANION. No, it doesn't say anything about the States.
>
> DEAN MANION. Now, how can you imagine that they finally worked this thing around so that New York was held to be prohibited by the first amendment?
>
> DAN MANION. It doesn't seem like they should have grounds.
>
> DEAN MANION. They shouldn't have any grounds. Do you know how they invented it?
>
> DAN MANION. Who invented it?
>
> DEAN MANION. About 1940 Justice Black began to say that the first amendment was married to the fourteenth—joined. Now read what the fourteenth says. I think I've got some underlining there.
>
> DAN MANION. Yes, underlined here, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.
>
> DEAN MANION. Does that say anything in there about prayer in the schools?
>
> DAN MANION. It sure doesn't.
>
> DEAN MANION. Now, of course, you might say well that guarantees religious freedom in the States, shall pass no law interfering with freedom. But the New York prayer case didn't interfere with freedom, it was voluntary. So they couldn't get on it from that basis. But Justice Black said the provisions of the first amendment are now a part of the fourteenth.
>
> DAN MANION. How did he arrive at that conclusion?
>
> DEAN MANION. Just spun it out of his head.
>
> DAN MANION. You mean there's no ground for that?
>
> DEAN MANION. None whatsoever, except a like decision by Justice Douglas a few years before and that decision of Justice Douglas as the reason why the first amendment should be married to the fourteenth.
>
> DAN MANION. So they come up with some decision that was wrong in the first place and then base all subsequent decisions on that wrong one?

Later in the broadcast, the attack on the incorporation doctrine continues:

> DAN MANION. They've established a precedent now that we have based all these decisions on and really there's no foundation for that?
>
> DEAN MANION. None whatsoever. Now this goes beyond the prayer cases. This goes to the entire Bill of Rights, which they have now held as a part of the fourteenth amendment, for the Justices to say that one part of the Constitution is another part of the Constitution is about as far as you can go in gratuitous misconstruction. Nevertheless, the jointure of the first amendment with the fourteenth is responsible for nine-tenths of the troubles which the states are now having with their redistricting, which you mentioned some time ago, and with the various other interferences with state laws, the schools, prayer and obscenity and the regulation of school districts. This all comes about because they said the first amendment is now a part of the fourteenth, which isn't so.
>
> DAN MANION. Well, I think you've pretty well established how this prayer decision was precedented fallaciously. The original case was wrong. . .

[24] Transcript of April 30, 1986, hearing, pp. 104, 120.
[25] *Id.*, p.13.
[26] *Id.*
[27] *Id.*, p. 17.
[28] Letter from Daniel A. Manion to the American Opinion Bookstore, Elkhart, Indiana, dated August 27, 1979.
[29] Transcript of April 30, 1986, hearing, p. 62.
[30] Transcript of April 30, 1986, hearing, p. 62.

In a discussion with Senator Simon concerning the 1979 letter to the John Birch Society at Mr. Manion's confirmation hearing, the following exchange took place:

> Senator SIMON. But do you find yourself believing what the John Birch Society says or do you not?
>
> Mr. MANION. Senator, I do not have any idea, other than those two things that you have mentioned, ...
>
> Senator SIMON. But you have a general impression. I am not asking about your father's membership but your attitude toward the John Birch Society.
>
> Mr. MANION. I judge any person just as an individual. As far as the Society itself, other than seeing literature that came along on occasion—I did not read it; I just saw—I do not know what issues, what their stands are on the Constitution or on any other issue of current affairs.
>
> Senator SIMON. But you do not have either a plus or a negative impression on the John Birch Society, then?
>
> Mr. MANION. Well, I am not a member, or I was not. I guess I have to judge each issue on its own. But as far as the Society itself, I know it has been pretty well criticized. It is not something that I participated in. I am not even sure who it was that wrote that letter.

[31] *Id.*, p. 62.
[32] Transcript of April 30, 1986, hearing, p. 49 (emphasis added).

APPENDIX A

THE CHICAGO COUNCIL OF LAWYERS

MAY 20, 1986.

Senator PAUL SIMON,
Dirksen Senate Building, Washington, DC.
Attention: Ms. Laurie Westley.

DEAR SENATOR SIMON: Pursuant to your request, the Chicago Council of Lawyers has reviewed the following briefs written by Daniel Manion:

1. Brief of Daniel Manion in *State of Indiana* v. *Sumney;*
2. Brief of Daniel Manion in *Culver Educational Foundation* v. *Indiana Civil Rights Commission;*
3. Appellee's Petition for Transfer to Supreme Court in *Bearman* v. *University of Notre Dame;*
4. Memorandum in Support of Appellee's Petition for Rehearing in *Bearman* v. *University of Notre Dame;*
5. Brief of Daniel Manion in *Hassing* v. *Insulated Panel Co. of Indiana, et al.*

1. Brief of Daniel Manion in *State of Indiana* v. *Sumney*

The brief is poorly written. It is riddled with spelling errors, typographical errors and grammatical errors. The author seems to have no knowledge of when to use an apostrophe to make a noun possessive. Disagreement between subject and verb is rather common. It appears that very little attention or care was given to finalizing this brief for the Indiana Court of Appeals.

In addition to the more mechanical defects noted above, the brief is stilted and rigidly follows the form of the appellant's brief. Sentence structure is frequently convoluted and awkward. Redundancies are common. A great many sentences unnecessarily begin with "But" or "And" as if to take the place of logical connections. The brief frequently slips into colloquialisms for no good reason, e.g., "Norm Henry", "didn't" or Henry would testify "on most any subject." (The last phrase appears three times in the brief.)

The brief is neither clear nor forceful. It repeatedly speculates on what a witness "possibly" would have said had testimony been allowed. *See, e.g.,* pp. 14, 15. The argument is unnecessarily hard to follow. A C- job, at best.

Page	
The typographical and spelling errors include:	
Cover	Appellan[t].
1	Appellees (Defendant[s]).
4	"comperable".

Page	
9	"comparbility".
	No consistency in "Tr." vs. "TR", e.g., compare page 6 with page 10.
12	"prnperty".
15	"relelvant".
16	"funtion".
17	No period at end of sentence.
19	"rediculous".
35	"resonable".
37	"of$ 15,000.00.
Grammatical errors include:	
2	"opinion testimony . . . were".
6	"witnesses" as possessive—no apostrophe.
	No comma after David Wells.
7	"Sumneys" as possessive—no apostrophe.
8, 11, 20	"most any subject".
9	"states"—no apostrophe.
10	Omitted comma.
12	Omitted comma.
14	Appellants—no apostrophe.
15	"landowners"—no apostrophe.
21	"McCloskeys"—no apostrophe.
23	"States"—no apostrophe.
26	"States"—no apostrophe.
	No comma.
28	"landowners"—no apostrophe.
29	"States"—no apostrophe.
	"agriculture use".
	"similarity were".
32	Needs comma.
Stilted or incorrect expressions include:	
4	last paragraph: "which" is far from its antecedent.
6	"the amount of rates".
11	"that being".
14	"would possibly have had".
15	"testified what he thought the property was worth . . .".
17	"bring into evidence with Mr. Henry".
29	first sentence: a "disparity . . . has caused the controversy in this argument.
Other examples of poor writing include:	
12	"Mr. Henry was the State's star witness who would establish this alleged fact since he was part of the so-called "sham".

Page	
14	"they discussed alternative sites if that happened".
15	"case possibly allows".
19	"rediculous nature of the claim".
	"bad feeling".
20	Terrible construction in last sentence of Section I.
23	"on a very similar response.
27	Poor sentence structure.
29	"the comparables used by each side were . . . opposite".
31	"to emphasize that there be".
	Inconsistent capitalization on State v. state, e.g., compare page 32 with pages 31 and 34.

2. Brief of Daniel Manion in *Culver Educational Foundation* v. *Indiana Civil Rights Commission*

The task of a federal court of appeal, as the tribunal of last resort for most litigants, is to interpret the law of the circuit for district court judges, the bar, and the public in cogent written opinions. Accordingly, the ability to write clearly and convincingly is a prerequisite for any judge or attorney who aspires to serve on a court of appeal. Daniel A Manion's brief in *Culver Educational Foundation* v. *Indiana Civil Rights Commission* indicates that Mr. Manion's writing ability falls substantially short of the minimal requirements for the position.

Mr. Manion's brief in the *Culver* case reflects some aptitude for analyzing a legal issue and developing a reasonable argument concerning that issue. However, the brief thoroughly fails to communicate Mr. Manion's arguments in any effective manner. The brief is poorly organized and contains numerous syntactical, spelling, and punctuation errors. Informal, even colloquial, language is not uncommon in the brief.

A. *Organization.* Mr. Manion's brief is extremely difficult to follow because it lacks both an initial summary of Mr. Manion's overall argument and internal summaries of his principal points. As a result, the reader cannot discern the gist of an argument by Mr. Manion until after completing the entire section of the brief devoted to that argument, if then.

B. *Syntax.* Mr. Manion's syntax is frequently awkward and sometimes even tortured. Consider the following examples:

Page 6: "When these issues are taken into consideration, the chain reaction resulting from the hearing officer's erroneous finding is immense."

Page 6: (introductory sentence for section of brief) "This can be taken even further once this major error is acknowledged.

Page 8: "(In fact, a corrected version of Bernauer's proposal, which is likely identical, should have been substituted for what is in the transcript)."

Page 11: "Not only has the Commission required an undue burden on Culver that is contrary to law, more significantly, it has made an erroneous finding without which its judgment cannot stand."

Page 15: "In her own testimony Ms. Bernauer has referred several times to her own attitude problems than how she was becoming discouraged or disappointed or frustrated or whatever with the various operations of the academy and how they affected her."

In one instance, on page 13 of Mr. Manion's brief, his sentence structure becomes so tangled that he states the exact opposite of what he intends: "These attitude changes, as revealed in the final evaluations or addendums thereto of Mr. Walker and Mrs. England, weighed heavily against her not receiving a new contract."

C. *Spelling.* The following words are misspelled in Mr. Manion's brief:

"Indina" (page 2).
"perponderance" (pages 4, 9 (twice), 10 (twice), 22).
"evidentary" (pages 7, 8).
"verbatum" (page 8).
"proferred" (page 10).
"languge" (page 11).
"despository" (page 14).
"accomodating" (page 14).
"liabilty" (page 20, four times).

D. *Punctuation.* Mr. Manion appears to have some difficulty in correctly using the possessive form of nouns and in using commas to separate independent clauses in compound sentences. An apostrophe was omitted from possessive nouns on at least three occasions in Mr. Manion's brief. Clauses in compound sentences were not properly set off by commas on at least seven occasions.

When considered separately, these criticisms might seem picayunish. Taken together, however, they demonstrate Mr. Manion's unfitness to sit on a court that depends upon clearly written communication to do its job.

3. Appellee's Petition for Transfer to Supreme Court in *Bearman* v. *University of Notre Dame*

4. Memorandum in Support of Appellee's Petition for Rehearing in *Bearman* v. *University of Notre Dame*

These comments address the substance and form of briefs submitted by Daniel Manion in *Bearman* v. *University of Notre Dame.* Mr. Manion's name is listed first on each of these briefs. "Memorandum in Support of Appellee's Petition for Rehearing" was submitted as an attachment to "Appellee's Petition for Transfer to Supreme Court."

Bearman involved an assault at a University of Notre Dame football game. Mr. and Mrs. Bearman left the game shortly before it ended. As they were walking through a parking lot toward their car, they observed two men who appeared to be drunk. The two were fighting. A few moments later, one of them fell into Mrs. Bearman from behind, breaking her leg. There were no ushers or security people in the area.

With respect to substance, these briefs appear to be average. They argue the strengths of the University's position, but they fail to confront its weakness.

The case turns on Comment (f) to the Restatement of Torts (Second) § 344 (1965). That Comment, quoted in the *Bearman* opinion, 453 N.E.2d at 1198, states:

> If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

The key basis for the court's opinion is the first clause of this sentence. The court held that the University should know that alcoholic beverages are consumed on the premises at tailgate parties and at its football games. The fact that such beverages are regularly consumed, by itself, supports the inference that the University had a duty to take reasonable precautions to protect its patrons from intoxicated persons. Implicitly, the court found it irrelevant that no assaults involving intoxicated persons had actually occurred in thirty years; knowledge could be inferred from "the place or character of his business."

Mr. Manion's briefs did not directly confront the court's analysis. They did not discuss the "place or character of his business" clause. Instead, they focused on the following clause, "or his past experience." The briefs do an adequate job of arguing that the University's past experience did not warrant providing additional protection. But by failing directly to confront the court's reasoning, the briefs do not give the court any convincing rationale for changing its result.

The briefs rely too heavily on distinguished Indiana law. *Sports, Inc.* v. *Gilbert*, 431 N.E.2d 534 (Ind.App. 1982), for example, involved an accident that occurred *off* the premises of a speedway following the speedway's eviction of an intoxicated person. The cited section of the Restatement did not apply, since the injured person was not an invitee of the speedway.

The briefs would have been more convincing if they emphasized the law from other states. Two cases, *Warner* v. *Florida Jai-Alai, Inc.*, 221 So.2d 777 (1969) and *Gill* v. *Chicago Park District*, 85 Ill.App.3d 903, 407 N.E.2d 671, 673 (1980), are much more favorable to the University. Those cases involve closer fact patterns and have results that favor the defendants. Mr. Manion's briefs would have been stronger if these cases were given more emphasis.

The style of the briefs is poor. The Supreme Court brief is particularly awkward in spots. The sentence and paragraphs do not flow. (*See*, for example, the end of paragraph B and Paragraph C on page 2.) There are also several spelling errors. These include "insurer" and "erroneously" on page 2 and "petition" on page 4 of the Supreme Court brief, along with "Court's" and "possessor" on page 3 of the Court of Appeals brief.

The two briefs do not represent outstanding advocacy and do not articulate in the most effective fashions the reasons for reversal of the *Bearman* court's opinion. These briefs are, at best, average in quality.

5. Brief of Daniel Manion in *Hassing* v. *Insulated Panel Co. of Indiana, et al.*

The major issue in Mr. Manion's brief is whether a promissory note and guaranty received by plaintiffs from Insulated Panel Co. constituted the sale of securities under Indiana law.

A. *Form.* There are a few typographical errors, but not a significant number. More important is Mr. Manion's convoluted syntax, repetition of points he wishes to make, use of the vernacular, and even an occasional misspelling. For example, on one occasion he spells "germane" correctly (p. 2) and on another "germaine" (p. 19).

He occasionally uses incomplete sentences (p. 3, "IA).

He sometimes changes tense in the same paragraph (p. 4).

On page 4, he states "without question, Mr. Bell had *no intention for anything* other than a short term loan."

It is sometimes difficult to determine the antecedents of words such as "this" or "it".

On page 8, he states that "in this case the parties *pretty much agreed* that the promissory notes were securities, but in determining whether or not a security was involved, the court followed a quadruple test . . . "

For an example of confusing syntax, see the top of page 9.

On page 10, he writes "the question has been raised, by the Plaintiff and their attorney . . . "

In sum, Mr. Manion's writing is pedestrian and often difficult to follow.

B. *Analysis of the Issue.* The brief does a fairly good job of setting out the factual and legal basis for Mr. Manion's client's position that the note and guaranty were not "securities" under Indiana law. However, the issue is not a complex one, and a major portion of the argument is devoted to quotations from depositions.

Mr. Manion's writing is less than persuasive partly because his brief is not very well organized and the confusing syntax often makes his arguments difficult to follow.

Mr. Manion appears to have done a modest amount of research but does not always use the case law effectively to mount a persuasive argument.

The above evaluations of Mr. Manion's briefs were each written by a different member of the Council's Federal Judicial Evaluation Committee. We proceeded in this manner in order to obtain a number of views concerning Mr. Manion's writing ability. The evaluations speak for themselves; they support the Council's conclusion that Mr. Manion has not demonstrated the level of legal skill necessary for appointment to the Seventh Circuit Court of Appeals.

Very truly yours,

THOMAS F. GERAGHTY,
Chair, Federal Judicial Evaluation Committee.

APPENDIX B

PROFILE OF THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

William Bauer graduated with honors from Elmherst College in 1949 and DePaul University Law School in 1952. From 1952–64 he was assistant, first assistant and, ultimately, State's Attorney for DuPage County. *Prior to being confirmed to the 7th Circuit in 1975, Mr. Bauer served as an Illinois Circuit Judge for 7 years and a Judge of the U.S. District Court for the Northern District of Illinois for 4 years.*

John Coffey was educated at Marquette University. He served as a judge of the Milwaukee County Civil Court from 1954–1960 and of the Milwaukee County Municipal Court from 1960–1962. Thereafter, he was judge (1962–72), senior judge (1972–75) and cheif presiding judge of both the criminal (1976) and civil (1976–1978) division of the Wisconsin Circuit Court. *Immediately prior to being appointed to the 7th Circuit in 1982, Mr. Coffey served for 4 years as a Justice of the Wisconsin Supreme Court.*

Richard Cudahy is a graduate of the U.S. Military Academy. After graduating from Yale University Law School in 1955, Mr. Cudahy served as an assistant to the legal advisor, U.S. Department of State for 2 years. Thereafter, from 1957–61, he was angaged in private practice of law. *Prior to being appointed to the 7th Circuit in 1967, Mr. Cudahy taught at Marquette University State Law School from 1961–66 and the University of Wisconsin Law School from 1966–67.*

Walter Cummings graduated from Yale University and Harvard Law School. He served as an assistant to the U.S. Solicitor General from 1940–46, special assistant to the U.S. Attorney General from 1944–46 and as U.S. Solicitor General from 1952–53. While in private practice, Mr. Cummings authored law review articles on Illinois State law, summary judgment practice in the 7th Circuit, and Federal anti-trust law. Prior to being appointed to the 7th Circuit in 1966, Mr. Cummings was engaged in private practice.

Jesse Eschbach graduated, with distinction, from Indiana University Law School in 1949. He was a member of the Indiana Law Journal and of Order of the Coif. From 1949–1962, Mr. Eschbach was engaged in private practice. He also served as a member of the board of managers and of the House of Delegates of the Indiana State Bar Association. *Prior to being appointed to the 7th Circuit in 1981, Mr. Eschbach was a judge of the U.S. District Court for the Northern District of Indiana from 1962 to 1981. He had been chief judge of that District since 1974.*

Frank H. Easterbrook graduated *cum laude* from the University of Chicago Law School and was a clerk to the Hon. Levin Campbell, judge of the U.S. Court of Appeals for the First Circuit. From

1974 to 1979, Mr. Easterbrook engaged in appellate practice as assistant (1974–77) and later Deputy (1978–79) Solicitor General of the United States. *Immediately prior to his appointment to the Seventh Circuit in 1985, he was a professor at the University of Chicago Law School.*

Thomas Fairchild served as Attorney General of Wisconsin from 1948 to 1950, and U.S. Attorney for the Western District of Wisconsin from 1951–1952. He also was chairman of the Governor's Commission on Constitutional Revision. *Prior to being appointed to the 7th Circuit in 1966, Mr. Fairchild had been a Justice of the Wisconsin Supreme Court.*

Joel Flaum served as assistant State's attorney in Cook County, Illinois (1965–69), first assistant Attorney General of Illinois (1962–1972) and first assistant U.S. Attorney from 1972–75. He has contributed various articles to law journals, lectured at North University School of Law, and was a member of the Illinois Law Enforcement Commission. *Immediately prior to being appointed to the Seventh Circuit in 1983, Mr. Flaum had been a Judge of the U.S. District Court for the Northern District of Illinois from 1975 to 1983.*

Wilbur Pell graduated *cum laude* from Harvard Law School in 1940. He was a special agent of the Federal Bureau of Investigation (1942–45) and Deputy Attorney General of Indiana from 1953–1955. He was president (1962–63), chairman (1968–69), and member of the board of managers of the Indiana State Bar Association and had lectured on Federal and State discovery procedures. *Immediately prior to his appointment to the Seventh Circuit in 1970, Mr. Pell had an extensive trial and appellate practice for 25 years in State as well as Federal court.*

Richard Posner graduated *summa cum laude* from Yale College in 1959 and Harvard Law School in 1962. He served as a clerk to Hon. William J. Brennan, Jr., U.S. Supreme Court and Assistant to U.S. Solicitor General Thurgood Marshall. *Immediately prior to his appointment to the 7th Circuit in 198i, Mr. Posner taught at Stanford University and the University of Chicago Law Schools.*

Kenneth F. Ripple graduated from the University of Virginia Law School in 1968 and earned an L.L.M. *summa cum laude* from George Washington University. From 1973 to 1977, he served as special assistant to the Chief Justice of the United States. He had lectured, among others, before the Indiana Judicial Conference. In 1977, Mr. Ripple joined the faculty of the University of Notre Dame Law School. He was appointed to the Seventh Circuit in 1985.

Luther Swygert graduated *magna cum laude* from Notre Dame Law School in 1927. Prior to being appointed to the 7th Circuit in 1961, Mr. Swygert served as a judge of the U.S. District Court for the Northern District of Indiana from 1943 to 1961.

Harlington Wood, Jr. graduated from the University of Illinois Law School in 1948. Mr. Wood has served as an Assistant Attorney General of the United States, Civil Division from 1972–1973. *Immediately prior to being appointed to the 7th Circuit in 1976, Mr. Wood was a Judge of the U.S. District Court for the Southern District of Illinois from 1973–76.*

* * * * * * *

Latham Castle who served as a senior judge until his death on March 10, 1986, graduated from Northwestern University Law School. Castle served as State's attorney for DeKalb County from 1928–1940, and as assistant Attorney General from 1940–1942. Castle is a past president of the National Association of Attorney's General and DeKalb County Bar Association. *He served for 7 years as the Illinois State Attorney General immediately prior to being appointed to the 7th Circuit in 1959.*

APPENDIX C[1]

PROFILE OF DANIEL MANION

DANIEL MANION

Nominated: 1986—ABA Rating: Majority Qualified, Minority Not Qualified.

Education:

1973—J.D., Indiana University School of Law.

Legal experience:

May-October 1973—Clerk, Office of Indiana Attorney General.

October 1973-May 1974—Deputy Attorney General (1 of approximately 75), State of Indiana (Land Condemnation Section).

1974-appointment—Private law practice.

1978-1982—Member, Indiana State Senate (part-time).

PROFILE OF CIRCUIT COURT APPOINTEES: 1981—PRESENT

STEPHEN H. ANDERSON

Appointed: 1985—ABA Rating: Well Qualified.

Education:

1960—LL.B., University of Utah Law School; Editor-in-Chief, Utah Law Review; Order of the Coif.

Legal experience:

1960-1964—U.S. Justice Department, Tax Division.

1964-appointment—Private law practice (25% of litigation practice in Federal courts; 75 cases tried to judgment; nominee was lead counsel in 80% of those cases).

1983-84—President, Utah State Bar.

FRANK X. ALTIMARI

Appointed: 1985—ABA Rating: Unanimously Qualified.

Education:

1951—LL.B., Brooklyn Law School.

1967—Doctor of Laws Honoris Causa, St. Francis College.

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[1] Unless an ABA rating is specifically noted as unanimous, the reader should not assume it was unanimous. Majority-minority ratings are not available for judges appointed prior to 1985.

Legal experience:

1951-1965—Private law practice, New York.
1954-1963—Professor of Law, St. Francis College.
1982-appointment—Judge, U.S. District Court, Eastern District of New York.

GLENN ARCHER

Appointed: 1985—ABA Rating: Majority Qualified, Minority Not Qualified.

Education:

1954—J.D., George Washington University Law School; Editor of George Washington Law Review.

Legal experience:

1954-1981—Private law practice.
1981-appointment—Assistant Attorney General for Tax Division, U.S. Department of Justice.

BOBBY RAY BALDOCK

Appointed: 1985—ABA Rating: Majority Qualified, Minority Well Qualified.

Education:

1960—J.D., University of Arizona.

Legal experience:

1960-1983—Private law practice, New Mexico.
1962-1981—Adjunct Professor at Eastern New Mexico University.
1983-appointment—Judge, U.S. District Court, District of New Mexico.

EDWARD R. BECKER

Appointed: 1981—ABA Rating: Exceptionally Well Qualified.

Education:

1957—LL.B., Yale Law School

Legal experience:

1957-1970—Private law practice.
1970-appointment—Judge, U.S. District Court, Eastern District of Pennsylvania.

ROBERT R. BEEZER

Appointed: 1984—ABA Rating: Well Qualified.

Education:

1956—LL.B., University of Virginia Law School.

Legal Experience:

1962-1970—Special Prosecuting Attorney for the State of Washington in two cases.
1962-1970—Judge *pro tem* for the Court of Seattle.
1956-appointment—Private law practice.

JEAN GALLOWAY BISSELL

Appointed: 1984—ABA Rating: Well Qualified.

Education:

1958—LL.B., University of South Carolina Law School, magna cum laude; Associate editor of Law Review.

Legal experience:

1958-1976—Private law practice.
1963-appointment—Several published articles relating to antitrust, tax, and other corporate legal issues.
1970-1976—Chairman, Continuing Legal Education Committee, South Carolina Bar.
1976-appointment—General counsel, South Carolina National Corporation and the South Carolina National Bank.
1976-1980—Senior Vice President, South Carolina National Corporation.
1979-1982—Secretary, South Carolina Bar Commission on Continuing Lawyer Competence.
1980-1981—Executive Vice President, South Carolina National Corporation.
1982-appointment—Vice-Chairman and Chief Administrative Officer, South Carolina National Corporation.

DANNY J. BOGGS

Appointed: 1986—ABA Rating: Majority Well-Qualified, Minority Qualified.

Education:

1968—J.D., University of Chicago Law School Charles Coolidge Debate Prize at Harvard; staff of University of Chicago Law Review; Hinton Moot Court Competition winner, University of Chicago.

Legal experience:

1968-1969—Bigelow Fellow and Instructor, University of Chicago.
1969-1970—Deputy Assistant for Legislative Affairs, Kentucky Department of Economic Security.
1970-1971—Administrative Assistant and Legal Counsel to Governor Nunn.
1972—Legisiative Counsel to Minority Leader of Kentucky House of Representatives.
1973-Attorney-Advisor for U.S. Department of Commerce.
1973-1975—Assistant to Solicitor General of U.S.

1975-1977—Assistant to Chairman of Federal Power Commission.

1977-1979—Deputy Minority Counsel for Senate Committee on Energy and Natural Resources.

1981-1982—Senior Policy Adviser in White House Office of Policy Development and Special Assistant to the President.

1983-appointment—Deputy Secretary of U.S. Department of Energy.

ROBERT BORK:

Appointed: 1982—ABA Rating: Unanimously, exceptionally Well Qualified.

Education:

1953—J.D., University of Chicago Order of the Coif.

Legal experience:

1953-1954—Law and Economics Project, University of Chicago Law School.

1954-1962—Private law practice.

1962-1973—Professor, Yale Law School.

1973-1977—Solicitor General, U.S. Department of Justice.

1977-1981—Professor, Yale Law School.

1981-appointment—Private law practice.

PASCO M. BOWMAN II

Appointed: 1983—ABA Rating: Qualified.

Education:

1958—LL.B., New York University School of Law.

1961-1962—Fulbright Scholar, London School of Economics; Managing Editor of New York University Law Review, Root-Tilden Scholar at New York University Law School.

Legal experience:

1958-1961—Private law practice, New York.

1962-1964—Professor, University of Georgia School of Law.

1970-1978—Dean and Professor of Law, Wake Forest University School of Law.

1978-1979—Visiting Professor, University of Virginia School of Law.

1979-appointment—Dean, University of Missouri School of Law.

MELVIN BRUNETTI

Appointed: 1985—ABA Rating: Majority Well Qualified, Minority Qualified.

Education:

1964—J.D., Hastings College of Law, University of California.

Legal experience:

1964-appointment—Private law practice (average of 25% of litigation practice in Federal courts; from 1978-appointment, was chief counsel on most cases).

JAMES BUCKLEY

Appointed: 1985—ABA Rating: Substantial Majority Qualified, Minority Not Qualified.

Education:

1949—LL.B., Yale Law School.

Legal experience:

1949-1958—Private law practice.
1958-1970—Corporate officer.
1971-1977—United States Senator.
1981-1982—Undersecretary for Security Assistance, United States Department of State.
1982-appointment—President of Radio Free Europe/Radio Liberty in West Germany.

ROBERT F. CHAPMAN

Appointed: 1981—ABA Rating: Well Qualified.

Education:

1949—LL.B., University of South Carolina Law School.

Legal experience:

1949-1971—Private law practice.
1971-appointment—Judge, U.S. District Court, District of South Carolina.

JOHN COFFEY

Appointed: 1984—ABA Rating: Qualified.

Education:

1948—LL.B., Marquette University School of Law.
1963—Honorary Doctor of Laws, Spencerian College; Marquette University Oustanding Law Alumnus 1980.

Legal experience:

1948-1954—Assistant City Attorney for City of Milwaukee.
1954-1960—Civil Court Judge for County of Milwaukee.
1960-1962—Municipal Court Judge for City and County of Milwaukee.
1962-1978—Circuit Court Judge for County of Milwaukee.
1978-appointment—Wisconsin State Supreme Court.

LEROY J. CONTI

Appointed: 1982—ABA Rating: Well-Qualified.

Education:

1948—LL.B., University of Michigan Law School; national Sigma Phi Epsilon citation award, 1979.

Legal experience:

1948-1969—Private law practice.
1952-1959—Solicitor of City of Canton, Ohio.
1962-1969—Member, Stark County (OH) Board of Elections.
1969-1971—Judge, Common Pleas Court of Stark County.
1971-appointment—Judge, U.S. District Court, Northern District of Ohio.

W. EUGENE DAVIS

Appointed: 1983—ABA Rating; Well-Qualified.

Education:

1960—J.D., Tulane Law School.

Legal experience:

1960-1976—Private law practice.
1976-appointment—Judge, U.S. District Court, Western District of Louisiana.

FRANK EASTERBROOK

Appointed: 1985—ABA Rating: Majority Qualified, Minority Not Qualified.

Education:

1973—J.D., cum laude, University of Chicago Law School.

Legal experience:

1973-1974—Law Clerk to Hon. Levin H. Campbell, U.S. Court of Appeals for the First Circuit.
1974-1977—Assistant to Solicitor General of United States.
1979-1981—Assistant Professor, University of Chicago Law School.
1981-appointment—Professor, University of Chicago Law School.

JAMES LARRY EDMONDSON

Appointed: 1986—ABA Rating: Majority Qualified, Minority Not Qualified.

Education:

1971—J.D., University of Georgia Law School; National Moot Court Team.

Legal experience:

1971-1973—Law Clerk to Hon. Sidney O. Smith, U.S. District Court for the Northern District of Georgia.
1973-1981—Private law practice.

1975-1984—Adjunct professor, University of Georgia Law School.

1982-appointment—Private law practice.

JESSE E. ESCHBACH

Appointed: 1981—ABA Rating: Exceptionally Well Qualified.

Education:

1949—J.D., Indiana University Law School; Editorial staff, Indiana Law Journal; U.S. Law Week Award; Hastings Law Scholarship, 1949; Order of the Coif.

Legal experience:

1949-1962—Private law practice.

1951-1953—City Attorney, Warsaw, Indiana.

1952-1955—Deputy Prosecuting Attorney, Warsaw, Indiana.

1962-1974—Judge, U.S. District Court, Northern District of Indiana.

1974-appointment—Chief Judge, U.S. District Court, Northern District of Indiana.

GEORGE G. FAGG

Appointed: 1982—ABA Rating: Well Qualified.

Education:

1958—J.D., Drake University Law School (first in his class).

Legal experience:

1958-1972—Private law practice.

1972-1982—District Judge, Iowa Court, Second Judicial Circuit.

1980-appointment—Chairman of Committee on Iowa Uniform Jury Instructions.

JOEL MARTIN FLAUM

Appointed: 1983—ABA Rating: Exceptionally Well Qualified.

Education:

1963—J.D., Northwestern University School of Law; Law Review Board of Editors.

1964—LL.M., Northwestern University School of Law; Ford Foundation Fellowship in criminal law (1964).

Legal experience:

1964-1965—Private law practice.

1965-1969—Assistant State's Attorney, Cook County.

1967-1968—Associate Director, Police Legal Advisor Program.

1967-1969—Lecturer, Northwestern University School of Law.

1969-1972—Assistant Attorney General of Illinois.

1972-1975—First Assistant U.S. Attorney for Northern District of Illinois.
1975-appointment—Judge, U.S. District Court, Northern District of Illinois.

WILLIAM R. GARWOOD

Appointed: 1981—ABA Rating: Exceptionally Well Qualified.

Education:

1955—LL.B., University of Texas Law School (first in his class).

Legal experience:

1955-1956—Law clerk, U.S. Court of Appeals for Fifth Circuit.
1956-1959—Judge Advocate General's Corps, U.S. Army.
1959-1979—Private law practice.
1979-1980—Associate Justice, Texas Supreme Court.

JOHN ROBERT GIBSON

Appointed: 1982—ABA Rating: Well Qualified.

Education:

1952—LL.B., University of Missouri Law School.

Legal experience:

1952-1981—Private law practice.
1981-appointment—Judge, U.S. District Court, District of Missouri.

RALPH GUY

Appointed: 1985—ABA Rating: Exceptionally Well Qualified.

Education:

1953—LL.B., University of Michigan Law School.

Legal experience:

1955-1958—Assistant Corporation Counsel, City of Dearborn, Michigan.
1958-1969—Corporation Counsel, City of Dearborn, Michigan.
1969-1970—Assistant U.S. Attorney, Eastern District of Michigan.
1970-1976—U.S. Attorney, Eastern District of Michigan.
1976-appointment—U.S. District Court Judge, Eastern District of Michigan.

CYNTHIA HOLCOMBE HALL

Appointed: 1985—ABA Rating: Qualified.

Education:

1954—LL.B., Stanford Law School.

1960—LL.M., New York University Law School.

Legal experience:

1959—Attorney, Valley National Bank.
1960-1964—Attorney, U.S. Department of Justice, Tax Division.
1964-1966—Attorney, U.S. Treasury Department, Office of Tax Legislative Counsel.
1966-1972—Private law practice.
1972-1981—U.S. Tax Court Judge.
1981-appointment—Judge, U.S. District Court, Central District of California.

PATRICK E. HIGGINBOTHAM

Appointed: 1982—ABA Rating: Exceptionally Well Qualified.

Education:

1961—LL.B., University of Alabama Law School.

Legal experience:

1961-1964—Judge Advocate Corps, U.S. Air Force.
1964-1975—Private law practice.
1975-appointment—Judge, U.S. District Court, Northern District of Texas.

ROBERT M. HILL

Appointed: 1984—ABA Rating: Well Qualified.

Education:

1950—LL.B., University of Texas Law School.

Legal experience:

1950-1970—Private law practice.
1970-appointment—Judge, U.S. District Court, Northern District of Texas.

E. GRADY JOLLY

Appointed: 1982—ABA Rating: Qualified.

Education:

1962—LL.B., University of Mississippi Law School.

Legal experience:

1969-appointment—Private law practice.
1976-1977—Vice President, Federal Bar Association.
1975-1978—Board of Directors, Jackson Urban League.
1975-1976—President, Goodwill Industries.

EDITH JONES

Appointed: 1985—ABA Rating: Majority Qualified; Minority Not Qualified.

Education:

1974—J.D., University of Texas Law School; Editor, Texas Law Review; Order of the Coif.

Legal experience:

1974-appointment—private law practice (25% of litigation in Federal courts, including U.S. Court of Appeals for the Fifth Circuit; 20 cases tried to judgment; nominee was sole or chief counsel in 16 cases).

ALEX KOZINSKI

Appointed: 1985—ABA Rating: Majority Qualified; Minority Not Qualified.

Education:

1975—J.D., UCLA Law School (first in class).

Legal experience:

1975-1976—Law clerk, U.S. Court of Appeals for the Ninth Circuit.
1976-1977—Law clerk, Chief Justice of the U.S. Supreme Court.
1977-1981—Private law practice.
1980-1981—Deputy legal counsel, Office of President-Elect Reagan.
1981—Assistant Counsel to the President.
1981-1982—Special Counsel, Merit Systems Protection Board.
1982-appointment—Chief Judge, U.S. Claims Court.

ROBERT J. KRUPANSKY

Appointed: 1982—ABA Rating: Qualified.

Education:

1948—J.D., Thomas Backus School of Law.

Legal experience:

1948-1951—Private law practice.
1951-1957—Assistant Attorney General, Ohio.
1958-1969—Private law practice.
1969-1970—U.S. Attorney, Northern District of Ohio.
1970-appointment—Judge, U.S. District Court, Northern District of Ohio.

FRANK J. MAGILL

Appointed: 1986—ABA Rating: Substantial Majority Well Qualified, Minority Qualified.

Education:

1955—LL.B., Georgetown University Law Center.

Legal experience:

1955-appointment—private law practice (90% of litigation practice in Federal courts; 3–5 cases per year tried to judgment; 1966-appointment, nominee was chief counsel in all cases).

DANIEL MAHONEY

Appointed: 1986—ABA Rating: Qualified.

Education:

1955—LL.B., Columbia Law School.

Legal experience:

1958–1962—Private law practice.
1962–1965—Conservative Party of New York, Vice-Chairman and Chairman.
1965-appointment—Private law practice (much of nominee's litigation practice was in Federal courts; practice included emphasis on defamation law).

CAROL LOS MANSMANN

Appointed: 1985—ABA Rating: Qualified.

Education:

1967—J.D., Duquesne Law School; Editor, Duquesne Law Review.

Legal experience:

1967–1968—Law clerk, Court of Common Pleas, Allegheny County, Pennsylvania.
1968–1972—Assistant District Attorney, Allegheny County, Pennsylvania.
1974–1982—Special Assistant Attorney General, Commonwealth of Pennsylvania.
1974–1982—Professor, Duquesne University School of Law.
1982-appointment—Judge, U.S. District Court, Eastern District of Pennsylvania.

H. TED MILBURN

Appointed: 1984—ABA Rating: Well Qualified.

Education:

1959—J.D., University of Tennessee College of Law.

Legal experience:

1959–1973—Private law practice.
1973–1983—Judge, Sixth Judicial Circuit of Tennessee, Third Division.
1983-appointment—Judge, U.S. District Court, Eastern District of Tennessee.

ROGER J. MINER

Appointed: 1985—ABA Rating: Well Qualified.

Education:

1956—LL.B., cum laude, New York Law School; Managing Editor, New York Law School Review.

Legal experience:

1959–1975—Private law practice.
1976–1981—Justice, New York State Supreme Court, Third Judicial District.
1981-appointment—Judge, U.S. District Court, Northern District of New York.

JOHN P. MOORE

Appointed: 1985—ABA Rating: Well Qualified.

Education:

1959—LL.B., University of Denver School of Law.

Legal experience:

1959–1962—Private law practice.
1962–1968—Assistant Attorney General, Colorado.
1968–1972—Deputy Attorney General, Colorado.
1972–1975—Attorney General, Colorado.
1975–1982—U.S. Bankruptcy Judge, District of Colorado.
1982-appointment—Judge, U.S. District Court, District of Colorado.

DAVID A. NELSON

Appointed: 1985—ABA rating: Unanimously Well Qualified.

Education:

1958—LL.B., Harvard Law School.

Legal experience:

1958–1959—Private law practice.
1959–1962—Attorney, Office of the General Counsel, Department of the Air Force.
1962–1969—Private law practice.
1969–1971—General Counsel, U.S. Post Office Department.
1972-appointment—Private law practice.

PAULINE NEWMAN

Appointed: 1984—ABA Rating: Qualified.

Education:

1958—LL.B., New York University School of Law.

Legal experience:

1954-appointment—FMC Corporation.

1961-1962—United Nations Educational and Cultural Organization.

1974-appointment—State Department Advisory Committee on International Intellectual Property.

1974-appointment—Several published articles relating to patent and copyright law.

1982-appointment—Advisory Board, Patent, Trademark and Copyright Foundation, Franklin Pierce Law Center.

JOHN NOONAN

Appointed: 1985—ABA Rating: Substantial Majority Qualified, Minority Not Qualified.

Education:

1954—LL.B., magna cum laude, Harvard Law School.

Legal experience:

1954-1955—Special Staff, National Security Council.
1955-1960—Private law practice.
1961-1963—Associate Professor, Notre Dame Law School.
1963-1966—Professor, Notre Dame Law School.
1966-appointment—Professor, Berkeley Law School.

ALAN E. NORRIS

Appointed: 1986—ABA Rating: Unanimously Well Qualified.

Education:

1960—LL.B., New York University School of Law.

Legal experience:

1961-1962—Private law practice.

1962-1966—Assistant Law Director and City Prosecutor, City of Westerville, Ohio.

1967-1980—Member, Ohio House of Representatives.

1976-1980—Instructor of Business Law, Otterbein College.

1981-appointment—Judge, Ohio Court of Appeals, Tenth District.

LAWRENCE PIERCE

Appointed: 1981—ABA Rating: Well Qualified.

Education:

1951—LL.B., Fordham University School of Law.

Legal experience:

1952—1954—Attorney, Legal Aid Society.

1954-1956—Assistant District Attorney, King's County, New York.

1956-1961—Private law practice.
1961-1963—Deputy Police Commissioner, City of New York.
1963-1966—Director, New York State Division for Youth.

1966-1970—New York State Narcotic Addiction Control Commission.
1970-1971—Visiting Professor, Criminal Justice, SUNY, Albany, New York.
1971-appointment—Judge, U.S. District Court, Southern District of New York.

RICHARD ROSNER

Appointed: 1981—ABA Rating: Substantial Majority Qualified, Minority Not Qualified.

Education:

1962—LL.B., magna cum laude, Harvard Law School.

Legal experience:

1962-1963—Clerk, U.S. Supreme Court.
1963-1965—Assistant to the Commissioner, Federal Trade Commission.
1965-1968—Assistant to the Solicitor General, U.S. Department of Justice.
1968-1969—Professor, Stanford University Law School.
1969-appointment—Professor, University of Chicago Law School.

GEORGE C. PRATT

Appointed: 1982--ABA Rating: Well-Qualified.

Education:

1953—LL.B., Yale Law School.

Legal experience:

1953-1955—Law clerk, New York State Court of Appeals.
1955-1976—Private law practice.
1976-appointment—Judge, U.S. District Court, Eastern District of New York.
1978-appointment—Adjunct professor, St. John's Law School.

KENNETH F. RIPPLE

Appointed: 1985—ABA Rating: Well-Qualified.

Education:

1968—J.D., University of Virginia Law School.
1972—LL.M., summa cum laude, George Washington University Law School.

Legal experience:

1969-1972—Office of the Judge Advocate General, U.S. Navy
1972-1973—Legal Officer, U.S. Supreme Court
1973-1977—Special Assistant to the Chief Justice of the United States (Judicial matters)
1977-appointment—Professor, University of Notre Dame Law School.

JAMES RYAN

Appointed: 1985—ABA Rating: Substantial Majority Well-Qualified; Minority, Exceptionally Well Qualified.

Education:

1956—LL.B., University of Detroit.

Legal experience:

1960-1966—Private law practice.
1966-1975—Circuit Court Judge, Third Judicial Circuit of Michigan.
1975-appointment—Justice, Supreme Court of Michigan.

ANTONIN SCALIA

Appointed: 1982—ABA Rating: Substantial Majority Qualified, Minority Well-Qualified.

Education:

1960—LL.B., Harvard Law School; Order of the Coif.

Legal experience:

1960-1967—Private law practice.
1967-1971—Associate Professor and Professor, University of Virginia Law Center.
1977—Visiting Professor, Georgetown University Law School.
1977-appointment—Professor, University of Chicago Law School.

LAURENCE SILBERMAN

Appointed: 1985—ABA Rating: Substantial Majority Qualified; Minority Not Qualified.

Education:

1961—LL.B., Harvard Law School.

Legal experience:

1961-1967—Private law practice.
1967-1969—Office of General Counsel, NLRB.
1969-1970—Solicitor, U.S. Department of Labor.
1970-1973—Under Secretary, U.S. Department of Labor.
1973-1974—Private law practice.
1974-1975—Deputy Attorney General, U.S. Department of Justice.
1975-1977—Ambassador to Yugoslavia.
1977-1978—Senior Fellow, American Enterprise Institute.
1978-1979—Private law practice.
1979-1983—Executive Vice President, Crocker National Bank.
1983-appointment—Private law practice.

EMORY SNEEDEN

Appointed: 1984—ABA Rating: Qualified.

Education:

1953—LL.B., Wake Forest School of Law.

Legal experience:

1951-1975—U.S. Army (active).
1976-1977—Legislative Assistant, then Administrative Assistant to Senator Strom Thurmond, as well as Minority Counsel on the Antitrust and Monopoly Subcommittee of the U.S. Senate Judiciary Committee.
1977-1978—Minority Chief Counsel and Staff Director, Subcommittee on Antitrust and Monopoly, and Chief Minority Counsel, U.S. Senate Judiciary Committee.
1978-1982—(intermittently) Associate Dean and Lecturer-in-Law, School of Law, University of South Carolina.
1979-1981—Chief Minority Counsel, Chief Counsel, U.S. Judiciary Committee.
1981-appointment—Private law practice.

WALTER STAPLETON

Appointed: 1985—ABA Rating: Substantial Majority Exceptionally Well Qualified, Minority Well Qualified.

Education:

1959—LL.B. cum laude, Harvard Law School.
1984—LL.M., University of Virginia Law School.

Legal experience:

1959-1970—Private law practice.
1963—Deputy Attorney General, Delaware.
1970-appointment—Judge, U.S. District Court, District of Delaware.

KENNETH W. STARR

Appointed: 1983—ABA Rating: Substantial Majority Qualified, Minority Not Qualified.

Education:

1973—J.D., Duke Law School.

Legal experience:

1973-1974—Law clerk, U.S. Court of Appeals, Fifth Circuit.
1974-1975—Private law practice.
1975-1977—Law clerk, Chief Justice of the United States.
1977-1980—Private law practice.
1981-appointment—Counselor to the Attorney General of the United States.

DEANELL REECE TACHA

Appointed: 1985—ABA Rating: Substantial Majority Qualified; Minority Not Qualified.

Education:

1971—J.D., University of Michigan Law School.

Legal experience:

1971-1972—White House Fellow.
1973-1974—Private law practice.
1974-1977—Director, Douglas County Legal Aid Society.
1974-appointment—University of Kansas Director of Legal Aid Clinic and Associate Professor of Law (1974-1977); Associate Dean and Professor of Law (1977-1979); Associate Vice-Chancellor for Academic Affairs and Professor of Law (1979-1981); Vice Chancellor for Academic Affairs and Professor of Law (1981-appointment).

DAVID R. THOMPSON

Appointed: 1985—ABA Rating: Substantial Majority Well Qualified; Minority Qualified.

Education:

1955—LL.B., University of Southern California Law School.

Legal experience:

1957-appointment—Private law practice (5% litigation practice in Federal courts; approximately 150 cases tried to judgment; in 34 of these the nominee was chief counsel).
1975—Vice President, San Diego County Bar Association.
1985—President, American Board of Trial Advocates, San Diego Chapter.

JUAN TORRUELLA

Appointed: 1984—ABA Rating: Well Qualified.

Education:

1957—LL.B., Boston University School of Law.
1984—M.P.A., University of Puerto Rico.
1984—Master of Law Degree, University of Virginia.

Legal experience:

1957-1958—Law clerk, Supreme Court of Puerto Rico.
1958-1960—Attorney, National Labor Relations Board.
1960-1974—Private law practice.
1975-appointment—Judge, U.S. District Court, District of Puerto Rico.

HARRY W. WELLFORD

Appointed: 1982—ABA Rating: Well Qualified.

Education:

1950—J.D., Vanderbilt University Law School.

Legal experience:

1951-1970—Private law practice.
1971-appointment—Judge, U.S. District Court, Western District of Tennessee.

CHARLES E. WIGGINS

Appointed: 1984—ABA Rating: Exceptionally Well Qualified.

Education:

1956—LL.B., University of Southern California Law School Associate Editor, U.S.C. Law Review.

Legal experience:

1956-1957—Law Clerk, Hon. Frank G. Swain, Los Angeles Superior Court.
1957-1967—Private law practice.
1967-1979-Member, U.S. House of Representatives.
1979-appointment—Private law practice.

JAMES HARVIE WILKINSON III

Appointed: 1984—ABA Rating: Qualified.

Education:

1972—J.D., University of Virginia Law School.

Legal experience:

1972-1973—Law clerk, U.S. Supreme Court.
1973-1978—Assistant and Associate Professor, University of Virginia Law School.
1981-1982—Professor, University of Virginia Law School.
1983-appointment—Professor, University of Virginia Law School.
1982-1983—Deputy Assistant Attorney General of the United States.

RALPH K. WINTER

Appointed: 1981—ABA Rating: Unanimously Qualified.

Education:

1960—LL.B., Yale Law School.

Legal experience:

1960-1961—Law clerk, U.S. District Court, District of Delaware.
1961-1962—Law clerk, U.S. Court of Appeals, Second Circuit.
1962-1963—Research Associate, Yale Law School.
1963-1964—Lecturer, Yale Law School.
1964-1967—Assistant Professor, Yale Law School.
1967-1968—Associate Professor, Yale Law School.

1968-1978—Professor of Law, Yale Law School.
1978-appointment—William K. Townsend Professor of Law, Yale Law School.
1968-1972—Consultant to the Subcommittee on Separation of powers, Senate Judiciary Committee.
1968-1970—Senior Fellow, Brookings Institute.
1971-1972—Guggenheim Fellow.
1972-appointment—Adjunct Scholar, American Enterprise Institute.

ROGER L. WOLLMAN

Appointed: 1985—ABA Rating: Majority Exceptionally Well Qualified; Minority Well Qualified.

Education:

1962—J.D., magna cum laude, University of South Dakota Law School.
1964—LL.M., Harvard Law School.

Legal experience:

1962-1963—Law clerk, U.S. District Court.
1964-1967—Private law practice.
1967-1971—Brown County State's Attorney, Aberdeen, South Dakota.
1971-appointment—Associate Justice, Supreme Court of South Dakota.

APPENDIX D

JUNE 1, 1986.

To the Senate Judiciary Committee:

The United States Senate has too often been confused and uncertain about its role in approving Federal judicial nominees. The Constitution entrusts the power to appoint the member of the third branch of the National Government not to the executive branch nor to the legislature, but to *both* political branches together: the President nominates, but the Senate must confirm. Providing "advice and consent" on judicial nominations, therefore, is no mere senatorial courtesy but a constitutional duty of fundamental importance to the maintenance of our tripartite system of government.

Those who wrote the Constitution certainly did not envision the Senate's power of "advice and consent" to be a formality. The allocation of the appointment power was the subject of keen debate at the Constitutional Convention of 1787, which initially proposed a draft that left the choice of Federal judges to the Senate alone. The adopted language was a compromise, and it is clear that those who agreed to the compromise did not view the Senate's role as merely ceremonial or ritualistic.

The reasons that the Framers contemplated a strong Senate role in the process of judicial appointments are plain. It must be remembered that Federal judges are not, like the President's cabinet, to serve the will of the Chief Executive, but officers appointed for life to a separate and independent branch of government. If those appointed to these lifetime judicial posts should ultimately prove unequal to the task or unsuited to the role, they cannot be dismissed. Impeachment by the House and trial by the Senate is the only constitutionally authorized method of removing unfit judges, and the great difficulty of such a process makes it usable only in situations of outrageous misconduct. The only practical opportunity to consider the merits of a judicial candidate, therefore, is before that appointment is made. It thus becomes not only appropriate, but obligatory, that the Senate pass on judicial nominees with greater scrutiny than it reviews the President's choices for his own subordinates.

Whatever the philosophy of government or theory of law, the demands that the Nation makes on its Federal judges are indisputably great. The Federal courts play an increasingly critical part in American government. The men and women of the Federal bench must possess open minds that are capable of grasping sophisticated legal analysis, and that can grapple intelligently with fundamental constitutional issues. To Federal judges is given the task of policing the boundaries between State and Federal government, of giving principled articulation to the content of the basic human rights protected by the Constitution, of enforcing the myriad and complex

Federal statutes and regulations, and of overseeing complicated commercial and criminal litigation. Senators therefore have a duty, both to the Constitution and to the Nation's citizens, businesses, and public and private institutions, to ensure that the President's nominees have the experience, the talent, the intellectual acumen, and the fairness of mind to perform their functions and, particularly in the case of appellate judges, to contribute lucidly to a body of legal precedents that can enlighten and guide trial courts, litigants, and those who must try to anticipate what courts will do.

Candidates for the Federal bench should meet a higher standard than that required for most government officers. A career marked by integrity, capacity, wisdom, and commitment is the minimal qualification. If it is not readily apparent that a candidate is truly distinguished, the burden should be on the President to demonstrate the merits of the nominee. A nominee's entire record—professional achievements, public service, academic credentials, appellate briefs or other legal writings, scholarly or other publications—should be reviewed carefully to screen out the merely competent, and certainly, the simply mediocre. Respect for the institution of the Federal courts—and for the onerous responsibilities of the Federal bench—requires nothing less.

The responsibility of appointment to the independent judiciary was divided between the White House and the Senate in part to avoid burdening the Federal courts with candidates selected solely to satisfy criteria unrelated to judicial excellence. The President is certainly entitled to prefer loyal supporters and like-minded thinkers in choosing among the exceptionally qualified; but no President has a right to treat Federal judgeships as mere patronage appointments simply to reward friends or to assure a judiciary packed with "true believers." And the Senate is surely not required to defer to the appointment of men and women whose most salient qualification is their location in a particular partisan line-up or their devotion to a particular cluster of political or philosophical views.

The Senate has the further obligation to assure itself that a nominee's substantive views of law are within the broad bounds of acceptability in American public life and not on its lunatic fringes—whether left or right. The Republic may demand—and its Senators ought therefore to ensure—that its life-tenured judiciary does not disdain the Bill of Rights or the Fourteenth Amendment's command for equal protection of the laws and due process.

The absence of evidence of a nominee's lack of adherence to constitutional values should not be deemed a sufficient ground for confirmation. When dealing with a lifetime appointment to the Federal bench, rather than the trial of a criminal defendant, one's doubts as to a candidate's commitment to the Bill of Rights or to constitutionally commanded equality must be resolved in favor of the Constitution rather than the candidate.

None of this is to say that the Senate, any more than the President, is justified in using litmus tests that seek out a candidate's unswerving commitment to upholding or reversing a particular legal precedent or line of decisions, such as those dealing with abortion or school prayer. None of us can foresee the shape of future constitutional controversies; few acts could be more ill-ad-

vised than the confirmation of "single-issue" nominees who appear to have been selected solely on the basis of their aversion to or endorsement of one particular line of legal doctrine.

Finally, the Senate must realize that, in the appointment process, the power of nomination belongs to the President alone. Senators are not entitled to a "short list" of their own. Therefore, it is not a sufficient objection to an otherwise legally distinguished and constitutionally acceptable nominee that a Senator would prefer someone from a different part of the legal profession or a different part of the country, or someone of a different race, gender, or ideology. But neither is a confirmation vote in order whenever the best that can be said of a nominee is that he has spent some time in law or public life and is untainted by any major scandal. Even at levels below that of the Supreme Court, where the need for exceptional distinction should be beyond debate, the Nation has a right to expect more than minimum qualifications and probable fitness from its Federal judges. And it has a right to insist that the Senate, whatever the practice of the past decade or two, recall the Framers' vision of its solemn duty to provide advice and consent, rather than perfunctory obeisance, to the will of the President.

PHILIP B. KURLAND.
WILLIAM R. KENAN,
Distinguished Service Professor,
University of Chicago.
LAURENCE H. TRIBE.
RALPH S. TYLER, Jr.,
Professor of Constitutional Law,
Harvard University.

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